

Political corruption, accountability and the media:
A study of motives and justifications

by

Stephen John Tanner B.A., M.A.

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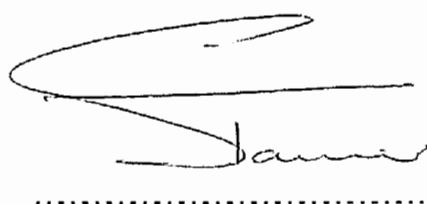
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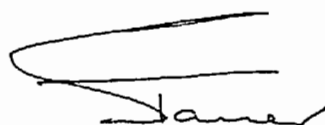
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Stephen Tanner
June 4, 1999.

Abstract

Political corruption, accountability and the media: a study of motives and justifications

This thesis is about political corruption. Specifically it is concerned with two issues: (1) the way in which people alleged to have committed a corrupt act seek to justify their actions; and (2) how the media report the process of allegation and justification which invariably occurs when such an issue becomes public. In short, the thesis is about accountability processes as they apply in Australia to elected public officials, particularly political leaders.

The thesis uses a single case study – the so-called Metherell affair in New South Wales – to argue that public figures will invariably struggle to justify conduct which has been labelled corrupt. The Metherell affair represents an important case study because it illustrates how behaviour can be variously interpreted by different groups and individuals. Conduct which is acceptable to some people, for example one's political supporters, may not be acceptable to one's political opponents. As such, individuals charged with political corruption will seek to apply a situational morality when attempting to justify such conduct. That task becomes even more difficult when the individual is asked to justify his or her conduct in a separate arena where different standards can be applied - in this case the Independent Commission Against Corruption (ICAC) which is governed by its own legislation which includes a particular formal-legal definition of corrupt conduct.

Likewise, the case study provides an important insight into the media's treatment of political corruption. Looking at the treatment of this issue in four newspapers over four and a half months, the thesis shows how the media was able to both inform and entertain the reading public whilst acting fairly. The study shows that whilst the media was critical of the Premier for sanctioning the appointment which led to the Metherell affair, it did not consider him corrupt as the term is popularly understood. In this sense it played an important role in highlighting the differences between formal-legal definitions of corruption (as applied by quasi-legal bodies like the ICAC) and popular definitions which draw on a range of more subjective considerations.

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Finally, I would like to dedicate this PhD to the memory of our youngest daughter, Lucy Kate Tanner, who shared our lives for just two weeks in late 1998 when the end was finally in sight. In that brief time she enriched our lives in a way not even a doctorate can do.

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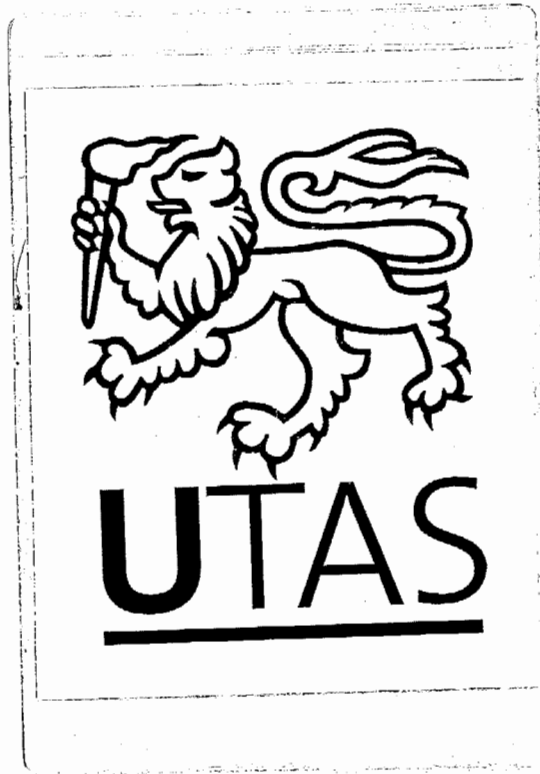
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Abbreviations

| | |
|---------|---|
| AFR | <i>Australian Financial Review</i> |
| DTM | <i>Daily Telegraph Mirror</i> |
| EPA | Environmental Protection Authority |
| FOI | Freedom of Information |
| ICAC | Independent Commission Against Corruption |
| MP | Member of Parliament |
| NSW | New South Wales |
| PSM Act | Public Sector Management Act |
| Qld | Queensland |
| QC | Queens Counsel |
| SES | Senior Executive Service |
| SMH | <i>Sydney Morning Herald</i> |
| W A | Western Australia |

Chapter 1

Introduction and methodology

Background

In mid 1992 the then Premier of New South Wales (NSW), Nick Greiner, and his Environment Minister, Tim Moore, were forced to resign after they were found to have acted corruptly in appointing Dr Terry Metherell, a former colleague and government minister-turned Independent MP, to a senior public service position. In handing down the decision, the head of the NSW Independent Commission Against Corruption (ICAC), Ian Temby QC, argued that Greiner and Moore had acted partially and in breach of public trust.¹ That is, they had induced Metherell to resign from Parliament so as to create a partisan advantage for Greiner's minority Liberal government. The ICAC labelled the appointment a blatant attempt to shore up the Government's precarious hold on government. It was, said Temby, a situation in which "a job had been bartered for a seat".²

The 'Metherell affair', as it became popularly known, was one of a number of corruption inquiries which took place in Australia during the late 1980s and early 1990s and inquired into political behaviour in the highest levels of state government.³ Whilst the circumstances which led to the various inquiries was different in each case, all focused public and political attention on the behaviour - both actual and expected - of MPs, including political leaders. All inquiries raised important questions about

¹ ICAC, *First Report on Investigation Into The Metherell Resignation and Appointment*, June 1992, 53. Hereinafter referred to as First Report.

² Ian Temby, interview, December 17, 1992.

³ The others included the so-called WA Inc Royal Commission which took place in Western Australia between 1988 and 1992; the Fitzgerald Inquiry in Queensland, the State Bank Royal Commission in South Australia, and the Rouse Bribery Royal Commission in Tasmania.

political standards and community expectations in relation thereto, about the difficulties that public officeholders experience in justifying behaviour which had long been a part of politics but was moving from the realm of the acceptable to the unacceptable in the public mind. These issues were especially evident in the Metherell affair and accordingly provided the motivation for this thesis.

The Metherell affair generated enormous angst, both political and public, over four and a half months between mid April and the end of August 1992. As a political issue it dominated NSW parliamentary affairs, and it dominated the media. Politically, it resulted in the Premier and Moore being censured by the Parliament and the ICAC inquiry being established. Armed with the ICAC findings, three of the four Independent MPs who held the balance of power in the Parliament threatened to support a planned Opposition no-confidence motion in the Government unless Greiner and Moore resigned their commissions. Despite requesting a stay so that they could challenge the ICAC finding in the NSW Court of Appeal, Greiner and Moore resigned as Premier and Minister for the Environment respectively to save the Government. Two months later they were cleared of the corruption finding by the NSW Court of Appeal.

In many respects the public and political reactions, and the extensive media coverage generated by the appointment, were predictable. When Greiner had been elected four years earlier, it had been on a clear anti-corruption platform.⁴ In fact Greiner's commitment to the fight against corruption dates back to the 1984 election campaign during which he claimed:

⁴ NSW had long been regarded as having a culture of corruption. It was this perception which Greiner first tapped into in 1984. This is widely documented. See, for example, Gary Sturgess, "Corruption: the Evolution of an Idea," in S. Prasser, R. Wear and J. Nethercote, eds, *Corruption and Reform: the Fitzgerald Vision* (St Lucia: University of Queensland Press, 1990), 3-24; David Hickie, *The Prince and the Premier* (Sydney: Angus and Robertson, 1985); Alan Moffitt, *A Quarter To Midnight* (Sydney: Angus and Robertson, 1985); I. Temby, "Safeguarding Integrity in Government," Papers on Parliament, No. 21, Senate, Parliament of Australia, December 1993, 8-9.

Our society is built on the rule of law and the trust of the people that public officials will govern in the public interest. The growth of corruption both within and outside of government has reached the stage where this public trust is threatened. The Liberal and National Parties are firmly committed to restoring integrity and public trust to government in New South Wales through a number of measures aimed at preventing and detecting corruption and to returning to an open system of government in which Parliament plays an important role in scrutinising the actions of the Executive Government.⁵

Whilst Greiner lost the 1984 election, he promised a number of key reforms, including the establishment of an anti-corruption commission. That commitment was maintained in the 1988 campaign, along with a promise to introduce a code of conduct for ministers and a pledge to upgrade the law on bribery.⁶ Greiner's commitment to reform was perhaps reflected in the second reading speech on the introduction of the bill to establish the ICAC. He said the ICAC would be empowered to investigate complaints against all people holding public office in NSW, irrespective of their position: "No one has been exempted. Ministers, members of Parliament, the judiciary, the Governor, will all fall within the jurisdiction of the ICAC."⁷ This statement would later return to haunt the Government during the Metherell affair.

So too would another promise attributed to Greiner. According to some commentators, Greiner's reform package included a promise to eschew jobs-for-the-boys appointments - a long time practice in Australian politics, although one which had been subjected to increasing public criticism. For his part, Greiner disputed this, arguing that his opposition was to appointments for which people were not qualified, rather than the appointment of supporters as such who may have the requisite skills for the position.

⁵ Anti Corruption Policy, Liberal Party of Australia (NSW Division), March 1984, 1.

⁶ N. Greiner, "A Change for the Better," Liberal Party policy speech, delivered at Rockdale Town Hall, March 6, 1988, 8.

⁷ Parliament of NSW, *Hansard*, May 26, 1988, 674.

Accordingly, the Metherell affair provides an interesting and, at the time it occurred, rather unique insight into politics in Australia. Traditionally political leaders who make jobs-for-the-boys appointments tend to be in a politically secure position. That is, they are able to brazen out any political reaction which might follow without risking their hold on government. Of course there have been exceptions, including Gough Whitlam's appointment of Senator Vince Gair as Ambassador to Ireland and the Holy See.⁸ In Greiner's case, however, not only was there a perception (misplaced or not) that he had promised to eschew such appointments, but more importantly, he did not control the numbers in the Legislative Assembly and thus was vulnerable to the reactions of the Independents and the Opposition.

Both these groups had their own interpretations of the appointment, the involvement of Greiner, Moore and Metherell therein in particular, and the consequences, including remedies, which they believe should flow therefrom. Greiner, Moore, and other members of the Government were prepared for the appointment to be labelled 'just politics' (and could be considered just another case of a "jobs-for-the-boys"), and in fact sought by their actions to quarantine the appointment to the political arena.⁹ The Opposition, however, questioned whether the appointment and the involvement of Greiner and Moore was illegal and amounted to corruption.¹⁰ For the non-aligned Independents, the appointment

⁸ Although the circumstances of the Gair Affair were different to those which led to the Metherell appointment. For a discussion of the differences see Malcolm Mackerras, "An affair with hypocrisy," *Australian*, April 28, 1992, 9.

⁹ The term 'jobs-for-the-boys' has traditionally been applied in a pejorative sense to describe inappropriate, perhaps morally questionable, but nonetheless legal appointments. The Opposition was clearly seeking to argue that the Metherell appointment was in a separate category.

¹⁰ It argued that the appointment may have been in breach of the Government's own *Public Sector Management Act 1988*, which laid down conditions for appointment to the Public Service; the Common Law, the *ICAC Act* (NSW) and the Commonwealth *Crimes Act*. As such, the Opposition argued that the appointment was more than a jobs-for-the-boys style appointment. In so doing, the Opposition compared the Metherell appointment to the so-called Rouse Bribery Royal Commission in Tasmania. In that case, which had occurred in 1989, Edmund Rouse, a prominent media proprietor, had been found guilty of attempting to bribe Jim Cox, a newly elected Labor member of the House of Assembly. Rouse had offered Cox \$110,000 over 4 years to support the then government of Liberal Premier Robin Gray. Cox told

transcended the purely political to embrace the moral.¹¹ As the thesis will later argue, the non-aligned Independents contended that irrespective of precedent, the appointment – and particularly the Premier’s involvement – could not be justified because it represented a breach of Greiner’s promise to the people of NSW. They argued that it could also have involved contempt of parliament, and possibly even political corruption. In taking these approaches, the Opposition and the non-aligned Independents were in fact foreshadowing the issues to confront the ICAC when it was ultimately asked to investigate the appointment.

Because of the particular stances adopted by the Opposition, the non-aligned Independents, and the ICAC, Greiner and the Government would inevitably struggle to keep the issue within the realm of ‘just politics’; and (b) justify the appointment and their involvement therein. Accordingly, the Metherell affair offers more than an insight into the principle of accountability at work under a minority government, important though that is. Perhaps more significantly, it provides an opportunity to look into: (1) the labelling of conduct and the criteria people use to assess the behaviour of public figures; (2) the way in which elected officials who are alleged to have committed a ‘corrupt’ act seek to justify their actions; and (3) how the media report the process of allegation and justification which typifies such a debate.

his leader and the police of the bribery attempt. This led to Rouse and his intermediary, former employee Anthony Alois, being charged and convicted to jail terms. For the details of this particular incident, see S.J. Tanner, “The Rise and Fall of Edmund Rouse,” *Australian Studies in Journalism* 4 (1995): 72-89.

¹¹ Like the Opposition, the non-aligned Independents focused on potential consequences of the appointment, namely the changes to the composition of the NSW lower House, conduct which they described as morally unacceptable and capable of bringing the Parliament into disrepute. For his part, the Premier argued that the Government was morally entitled to Metherell’s seat, given that the former Member for Davidson had been elected as a Liberal Member of Parliament and not as an Independent. Greiner would ultimately argue that in agreeing to Metherell’s appointment to the EPA he was simply restoring the status quo – namely the balance between the parties as it had existed as a consequence of the previous election. The non-aligned Independents, on the other hand, argued that the Premier had no right, moral or political, to offer Metherell a job in return for his seat. They were incensed by his involvement in the appointment, particularly in light of the promises he had made to improve parliamentary standards and supposedly not to participate in jobs-for-the-boys appointments.

Aims and objectives

The thesis has four broad aims:

- (1) to explore the links between political 'corruption' and notions of accountability, particularly when the conduct involved has been an accepted part of politics, as has traditionally been the case with jobs-for-the-boys, but is no longer accepted by sections of the community;
- (2) to provide some insight into the strategies used by public figures to justify conduct which has been labelled 'corrupt'; and particularly the difficulties they experience in dealing with different audiences and operating within different arenas;
- (3) to investigate the role of the media as an anti-corruption mechanism, including the willingness of journalists and media organisations to apply the 'corrupt' tag to conduct ; and
- (4) to compare the media's attitudes towards so-called 'corruption' and public attitudes towards the same conduct.

The thesis will argue that because of the difficulty involving in arriving at a universally agreed upon definition of 'corruption' it is unlikely that there will be agreement between elites and non-elites over the labelling of some types of conduct, particularly when that behaviour has traditionally been accepted by sections of the community. Furthermore, it will be argued that whilst elected public figures generally acknowledge an obligation to account for their behaviour whilst in office, they will nonetheless seek to cast their conduct in the best possible light, that is in a way which is most likely to be accepted. In taking this approach, the

thesis will argue, however, that the success or failure of the strategies adopted can be influenced by a range of factors, including the audiences which the politician is seeking to convince as to the merits of his or her behaviour and the arena in which the account is being demanded or presented. Finally, the thesis argues that the media has an important role to play as an anti-corruption mechanism. Despite the difficulties inherent in arriving at a universally accepted definition of corruption, and the constraints imposed on the media, it will be argued that newspapers play an invaluable and, on the whole, responsible role in holding public figures to account for behaviour which may be contrary to public expectations or ideals.

A case study approach

In looking at how politicians seek to justify their actions in the context of claims of political corruption, it was decided to adopt the single case study approach. Whilst the case study has received mixed reviews amongst academics, Feagin, Orum and Sjoberg point to a “reawakening and growing interest” in this approach.¹² Certainly there have been a number of text books published during the 1980s and 1990s which promote the use of either single or comparative case studies, both as a stand alone or complementary methodology.¹³ As a research strategy in political science it has been recommended by, amongst others, Fesler,¹⁴ Walter,¹⁵ Bock,¹⁶

¹² Joe R. Feagin, Anthony M. Orum, and Gideon Sjoberg, eds, *A Case for the Case Study*, (Chapel Hill: University of North Carolina Press, 1991), 1.

¹³ For example, see Robert K. Yin, *Case Study Research: Design and Methods*, revised edition, Applied Social Research Methods Series, vol. 5 (Newbury Park: Sage, 1989); Feagin, Orum, and Sjoberg, eds, *A Case for the Case Study*; and Charles C. Ragin and Howard S. Becker, eds, *What is a Case? Exploring the Foundations of Social Inquiry*, (Cambridge: Cambridge University Press, 1992).

¹⁴ James W. Fesler, “The Case Method in Political Science,” in Edwin A. Bock, ed, *Essays on the Case Method* (Inter-University Case Program: International Institute of Administrative Sciences, 1962).

¹⁵ James Walter, “The Value of Individual Case Studies, and an Instance of Research Methodology,” *Melbourne Journal of Politics* 10 (1978): 81-93.

¹⁶ Edwin A. Bock, “Improving the Usefulness of the Case Study,” In Donald M. Freeman, ed., *Foundation of Political Science: Research, Methods and Scope* (New York: Free Press, 1977).

Eckstein,¹⁷ and George.¹⁸ Feagin et al identify Robert Dahl's New Haven study as an outstanding example of a case study project.¹⁹ The case study approach is widely adopted amongst corruption researchers, and recommended by Gronbeck.²⁰

According to Merriam, case studies possess four defining characteristics. They are (1) particularistic; (2) descriptive; (3) heuristic; and (4) inductive.²¹ Case studies are particularistic in that they enable and encourage the researcher to study a particular individual, group, institution, event or phenomenon in great detail.²² They are descriptive in that they provide a detailed analysis of the subject; heuristic because they have the ability to provide greater insight into and understanding of the subject; and inductive in the sense that principles and generalizations emerge from an examination of the data. As Wimmer and Dominick point out: "[m]any case studies attempt to discover new relationships rather than verify existing hypotheses."²³ That is, the case study approach can also encourage theory building.²⁴

Unlike some other research strategies, its advocates claim, the case study encourages the researcher to draw from a wide range of data sources, rather than focusing on one or several. And, most significantly, the case

¹⁷ Harry Eckstein, "Case Study and Theory in Political Science," in Fred I. Greenstein and Nelson W. Polsby, eds, *Handbook of Political Science*, vol. 7 (California: Addison-Wesley, 1975).

¹⁸ Alexander L. George, "Case Studies and Theory Development: The Method of Structured, Focused Comparison," in P.G. Lauren, *Diplomacy* (New York: The Free Press, 1979).

¹⁹ Robert A. Dahl, *Who Governs? Democracy and Power in an American City* (New Haven: Yale University Press, 1961). Cited in Feagin, Orum and Sjoberg, *A Case for the Case Study*, 6.

²⁰ B. Gronbeck, "The Rhetoric of Political Corruption: Sociolinguistic, Dialectical and Ceremonial Processes," *The Quarterly Journal of Speech* 64 (1978): 171-72.

²¹ S.B. Merriam, *Case Study Research in Education* (San Francisco: Jossey-Bass, 1988). Cited in Roger D. Wimmer and Joseph R. Dominick, *Mass Media Research: An Introduction*, 3d ed., (California: Wadsworth Publishing Company, 1991), 150.

²² Feagin, Orum and Sjoberg, *A Case for the Case Study*, 2; Yin, *Case Study Research*, 13-20; Roger D. Wimmer and Joseph R. Dominick, *Mass Media Research: An Introduction*, 3d ed., (California: Wadsworth Publishing Company, 1991), 150.

²³ Wimmer and Dominick, *Mass Media Research*, 150

²⁴ See for example, Eckstein, "Case Study and Theory in Political Science," 80. However this is not always the case, as Stake argues in "Case Studies," 237, when he discusses intrinsic case studies.

study approach enables the researcher to "... study human events and actions in their natural surroundings",²⁵ whilst "retain[ing] the holistic and meaningful characteristics of real-life events".²⁶ It also "permits the observer to render social action in a manner that comes closest to the action as it is understood by the actors themselves".²⁷ In this respect it is often contrasted with the artificiality and manipulation which characterises an experiment.²⁸ In fact Fesler says one of the case study's great strengths is the fact that it forces the researcher to:

[B]ring himself into contact with the real-life situation with its full complexity - that is a multiplicity of variables many of which refuse to stand still, to remain constant in weight or intensity in relation to other variables, or to be indifferent to stimuli originating outside the initial frame of the chosen picture.²⁹

Certainly this was the case with the Metherell affair. It involved a complex, real-life situation, involving (as later chapters show) a quickly changing plot.

The case study approach appeals for the present study for a further reason too. Because of its focus on the natural environment, the case study can provide researchers with "... empirical and theoretical gains in understanding larger social complexes of actors, actions and motives".³⁰ Not only that, however, but case studies have shown how "the definition of a role emerges out of interactions between role-occupants and others".³¹ As Feagin et al argue: "[a] good case study can provide a full sense of actors' motives that eventuate in specific decisions and events",³² and enables the researcher to "examine how humans develop 'definitions of the situation'".³³ It goes beyond the actions of central

²⁵ Feagin, Orum and Sjoberg, *A Case for the Case Study*, 7

²⁶ Yin, *Case Study Research*, 14.

²⁷ Feagin, Orum and Sjoberg, *A Case for the Case Study*, 8.

²⁸ *ibid.*

²⁹ Fesler, "The Case Study Method in Political Science," 76.

³⁰ *ibid.*

³¹ Feagin, Orum and Sjoberg, *A Case for the Case Study*, 9.

³² *ibid.*, 10.

³³ *ibid.*, 11.

characters, to also consider their “intentions, strategies, interpretations and perspectives”.³⁴ According to Yin, the case study approach is especially suited to the asking of ‘why’ and ‘how’ questions or when the investigator has little control over the events.³⁵ The value of the case study approach in a thesis such as this is captured by Walter:

Perception is a meaningful activity. We do not simply passively register the world, we interpret it. We see events, ascribe meaning to them, and describe them as an action. That is we describe what someone does by guessing what he means to do. Action, then, depends upon intention, or the intention we see in it. ... One event, then, might be seen as many actions, depending upon its interpretation. By extension, since we are all free in this process of ascribing purpose or motive to humanly initiated events, and may be so diverse in our interpretations that the same event may be taken by different people to constitute different actions, it would not be surprising to find different people within the same conflict situation claiming to “see” different things going on.³⁶

In a case like the Metherell affair there was such an opportunity. The key participants - Greiner, Moore, Metherell - and the other witnesses each have their own version of events. The Opposition, non-aligned Independents, other MPs, and the ICAC have their own interpretations. So too did the journalists who observed and reported on the developing situation and the public who relied on the media for the events to be explained. In such a case study, therefore, we not only have the opportunity to see the events through the eyes of the principal actors, but also through those of secondary observers.

Case Study Data Base

The Metherell affair generated an enormous quantity of primary and secondary data, including media releases; official government documents, including letters of appointment; parliamentary debates; ICAC hearing transcripts (1220 pages); three ICAC Reports; Court of

³⁴ Bock, “Improving the Usefulness of the Case Study,” 683.

³⁵ Yin, *Case Study Research*, 13. See also Wimmer and Dominick, *Mass Media Research*, 151.

³⁶ Walter, “The Value of Individual Case Studies,” 85.

Appeal hearing transcripts (220 pages); and the subsequent Court of Appeal judgment. There was also an enormous number of newspaper articles and transcripts of press conferences and media interviews (both radio and television). To complement that information, the author was able to conduct interviews with a number of the key figures in this case, including Nick Greiner (2 interviews), Tim Moore (1 interview), Ian Temby (2 interviews), and John Hatton (1 interview).³⁷

In order to manage this information and to use it most effectively, it was decided to divide the Metherell affair into three periods. The first extends from the announcement of Metherell's resignation from Parliament and appointment to the EPA on April 10 through to and including the lead-up to the establishment of the ICAC Inquiry. Part two covers the inquiry period itself. It begins on May 5 and concludes prior to the release of the First ICAC Report into the appointment. The third and final period begins with the release of the ICAC findings against Greiner and Moore and concludes with their acquittal by the NSW Court of Appeal. The use of these compartments made the whole process of data gathering and analysis far more manageable. It also makes sense in terms of the objectives of this thesis, particularly the desire to understand how the accused sought to explain and justify their actions, not only over time, but also in different arenas and to different audiences.

³⁷ In the case of Greiner and Moore the author was particularly fortunate. Both have been reluctant to discuss the Metherell appointment since their premature departure from politics. However both agreed to an interview shortly after they had left the political arena; in Greiner's case he also agreed to a later, more in-depth interview and lent the author his personal files on this issue. The first interview with Temby was almost immediately after the inquiry, the second in late 1993 during an anti-corruption conference in Cancun, Mexico. The Hatton interview was likewise conducted in Mexico. Of the other two non-aligned MPs, Clover Moore provided access to her office files on the appointment, although she would not agree to an interview. Dr Peter Macdonald likewise would not agree to an interview. Brad Hazzard, a key MP early in the negotiation process, also declined to be interviewed. The author was however able to interview two other NSW MPs, and two key Opposition staffers during the course of his research. Although the two MPs were not directly involved in the appointment process, they did nonetheless provide an interesting insight into the responses of MPs. The staffers were both in senior advisory positions and provided an important insight into strategies adopted by the Opposition during this period. The interviews used a semi-structured format, each lasting approximately two hours.

In analysing media treatment of the Metherell affair, it was decided to focus solely on newspapers. The thesis concentrates on the print media for a number of reasons. Despite evidence to suggest that newspaper readership is declining,³⁸ it is argued that the print media is better placed to devote the time, resources and space required to cover such an issue in detail than the electronic media. It also provides a more manageable and financially accessible resource, given that copies of the newspapers are readily available either in hard copy or on microfilm.³⁹

Four newspapers were selected - the *Sydney Morning Herald (SMH)*, the *Australian*, the *Daily Telegraph Mirror (DTM)*, and the *Australian Financial Review (AFR)*. These newspapers were chosen for a number of reasons. The *SMH* was an obvious choice, being the main quality daily in NSW. It is also recognized as a newspaper "of record".⁴⁰ The *DTM*, on the other hand, provided an obvious contrast. Like the *SMH*, the *DTM* is NSW-based and enjoys a large circulation.⁴¹ Unlike the *SMH*, however, which is a broadsheet, the *DTM* is a tabloid. Given the different reputations which broadsheet and tabloid newspapers generally enjoy, the former tending to be regarded as "quality" publications, the latter as "popular", it is tempting to hypothesise that their coverage of the inquiry would differ substantially. The *Australian* and the *AFR* were selected because they are national dailies and hence may be inclined to take a broader, less state-centric approach to their coverage of the appointment.

³⁸ J. Henningham, "Journalism in the USA and Australia: Some comparisons," *Australian Journal of Communication* 22, no.1 (1995): 80.

³⁹ In this case the author was provided with the Tasmanian Parliamentary Library's discarded copies of the *Sydney Morning Herald*, *Australian* and *Financial Review*. Copies of relevant articles published by the *Daily Telegraph Mirror* were obtained during two research trips to Canberra. All articles and letters to the editor were measured and photocopied. Whilst this was a time consuming process, it did ensure that the author had a complete set of articles covering all four newspapers. Tapes of radio and television broadcasts and interviews, on the other hand, are often not available, or are expensive to purchase. It can also be a costly and time consuming process to transcribe them so that they are in a form whereby they can be directly compared with the main official documents.

⁴⁰ M. W. Jackson and H. Nelson. "The Forbidden City: Ethics in Australian Governments," *Corruption and Reform* 6, no. 2 (1992): 135.

⁴¹ In the lead-up to the period covered by the Metherell affair, the four newspapers enjoyed the following circulation: *Australian* (148,574); *SMH* (267,267); *DTM* (491,197) and *AFR* (76,637). See Australian Press Council, *Annual Report*, no. 16, 1992: 154, 163.

The *AFR* was also chosen because of the interest it had shown in Nick Greiner's managerialist approach to government during his term as NSW Premier. While the broadsheet versus tabloid dichotomy again shows up in the choice of these two newspapers, in this instance it is potentially less meaningful, given that the *Australian* and *AFR* are both recognised as "quality" publications.

During the survey period the four newspapers published 940 articles and 293 letters to the editor on this issue. The breakdown is contained in Table 1.1 below:

| Table 1.1: Articles and letters published | | | | | |
|---|-----|-----|-------|-----|-------|
| | SMH | DTM | Aust. | AFR | Total |
| Articles | 374 | 256 | 243 | 67 | 940 |
| Letters | 145 | 100 | 46 | 2 | 293 |
| Total | 519 | 356 | 289 | 69 | 1233 |

All were sourced from the one edition of each newspaper. In each case this was an edition that was readily available outside of NSW. Whilst clearly there are disadvantages with such an approach, in that the reader is not able to follow changes in editorial emphasis which may occur over editions throughout the day, it does nonetheless provide for a certain consistency across the data.

Given the small time frame (four-and-a-half months from the time of the appointment to the release of the Court of Appeal decision), and the relatively small number of newspaper articles involved, it was decided to include all relevant articles in the study. The study was restricted to articles published in the Monday to Saturday editions of the *SMH*, *DTM* and *Australian*, and the Monday to Friday editions of the *AFR*.⁴² The alternative approach - to put together a representative sample based on a

⁴² At the time of the Metherell affair, the *AFR* did not publish a Saturday edition. It has since commenced doing so. The Sunday editions of the *SMH* and the *DTM* were not included in the survey because they had a separate editor and staff of journalists.

composite week or other period of time - was rejected.⁴³ It was felt that such an approach could skew the results unnecessarily, given that one of the purposes of the study was to ascertain if media coverage of this issue was event-driven, rather than being spread evenly over the whole period. The articles were broken down, by newspaper, into three categories: (1) editorials; (2) news and opinion (this included news, background, comment and opinion pieces); and (3) cartoons.

Structure

The thesis has been divided into three parts. Part one covers chapters two and three and is theoretical in focus, providing a framework for the case study which is explored in parts two and three of the thesis. Chapter two introduces three topics: (1) corruption, (2) accountability, and (3) the process of justification. Not surprisingly, these topics are interlinked. The chapter begins by considering the three definitional approaches to the question 'what is corruption'? This is an important question in the context of the ICAC's findings in the Metherell inquiry because it shows how there can be confusion and disagreement over the meaning of corruption and the labelling of conduct. The chapter shows that our attitudes towards corruption can be influenced by a range of subjective as well as objective criteria.

The chapter then turns to a discussion of accountability. The link between corruption, or allegations thereof, and accountability is an obvious one. As the chapter explains, public office is held on trust. Mechanisms - both legal and political - have been put in place to ensure that elected and appointed public officials alike remain accountable to the people. One of the purposes of accountability mechanisms is to ensure that public officials do not engage in corrupt conduct (including using their office for personal gain). Whilst this appears relatively straight-

⁴³ The merits of these various approaches are discussed by Daniel Riffe, Charles F. Aust and Stephen R. Lacy in "The Effectiveness of Random, Consecutive Day and Constructed Week

forward, it is in fact quite a complex issue. Such is the nature of politics that often there will be a clash between 'self interest' and the so-called public interest which MPs are expected to serve.

When an issue arises in which self interest and public interest are said to clash frequently the debate will turn to the question of motive. This can often lead to individuals being forced to justify or explain, that is to account for, their behaviour. Whilst this is an integral part of the accountability process, there are often a number of factors which may help to mitigate, or at least explain, the behaviour in question, including role conflict and role strain. The difficulties which individuals confront in seeking to justify political behaviour is covered in the final section of chapter two.

In chapter three, the thesis analyses the role of the media as an accountability mechanism. It argues that this is a particularly important role from a democratic perspective because the media acts as a two-way conduit between voters and their elected representatives. The chapter begins by looking at the historical role of the media as a 'watchdog' or 'fourth estate'. It will argue that whilst the media promotes this role, its effectiveness may, in some respects, be overstated. There are a number of reasons for this, including a move away from a straight informational role to one which mixes information and entertainment (and in the process producing a commodity called 'infotainment'). In fact, there is evidence to suggest that the media is vulnerable to manipulation from sources, particularly high profile politicians. That is, these individuals frequently control the information media organisations require to inform people about what is happening. To counter this view, however, it can also be argued that the media is in a position whereby it can decide what is ultimately published as 'news'. The thesis uses Masterton's criteria of newsworthiness, outlined in chapter three, to indicate what

Sampling in Newspaper Content Analysis," *Journalism Quarterly* 70, no. 1 (Spring 1993): 133-39.

characteristics journalists use when determining whether information should be translated into news.⁴⁴

The chapter then turns to the role of the media as an anti-corruption mechanism. It argues that whilst there is a reluctance on the part of media organisations to pour resources into investigative journalism which may or may not produce a story, they are nonetheless interested in corruption. Not only that, but there is a view amongst corruption fighters that the media has an important role to play in the fight against corruption. However against this there is also a belief that journalists often allow the desire for a scoop or a front page headline to influence their coverage of a corruption story. This highlights the dilemma identified in chapter three which confronts the industry today - of trying to seek a balance between the media's informational responsibilities and its entertainment function or its public service versus profit making obligations. This chapter also identifies a number of other constraints - legal and institutional - which may prevent the media from fulfilling its anti-corruption role.

Part two of the thesis looks at the events which make-up the case study and is divided into three chapters. Chapter four begins with Terry Metherell's resignation from Parliament and subsequent appointment to the public service and ends with the lead-up to the formal ICAC inquiry. This period includes the immediate reaction to the appointment; attempts by the Premier, the Environment Minister and the Government to play down the significance of the appointment, and claims by the Opposition and Independent MPs that the behaviour of Greiner and Moore was 'corrupt' or inappropriate; the debate over whether there should be an inquiry into the appointment, and if so what form the inquiry should take; and finally the censure motion against Greiner and Moore in the NSW Parliament.

⁴⁴ M. Masterton, "A new approach to what makes news news," *Australian Journalism Review*

Chapter five covers the inquiry period itself, including the debate over the applicability of the ICAC Act, and thus the formal-legal definition of corrupt conduct employed therein, to Ministers of the Crown. This period marks a change from that covered in chapter four. Whereas in the early period Greiner and Moore were able to control the release of information, during the inquiry phase they were not. This, and the change of arena – from a political to quasi-judicial setting - made their task of justifying the appointment more difficult.

The difficulty they confronted is also highlighted in chapter six. This chapter deals with the period which begins with the release of the first ICAC Report into the Metherell Affair. It also covers the subsequent appeal by Greiner and Moore to the NSW Court of Appeal, the release of the second ICAC Report which "sought to set the record straight", that is, it responded to the Court's decision to overturn the ICAC ruling that they were corrupt according to the Act; their resignations as Premier and Minister respectively and subsequently their resignations as MPs. This chapter reinforces the problems to be identified in chapter two, namely providing a definition of corrupt conduct which meets both formal-legal and community expectations.

Part three of the thesis is likewise divided into four chapters. The first chapter in this section - chapter seven - charts media 'interest' in this issue in a quantitative sense. It looks at the total space allocated to the Metherell affair by the four newspapers over the study period. Two measures have been used, including total stories allocated and square centimetres assigned to coverage of this issue by each of the four newspapers. This approach has been used in other studies, for example McGregor's 1993 study of the coverage of crime news by New Zealand newspapers.⁴⁵ Whilst use of a square centimetre measure requires the allocation of considerable time, this cost is outweighed by the advantages.

14, no. 1 (Jan-June, 1992): 21-6.

⁴⁵ J. McGregor, *Crime News as Prune News in New Zealand's Metropolitan Press*. Legal Research Foundation, no. 36, 1993.

The most obvious advantage is that this approach encourages a holistic analysis of media coverage.⁴⁶ This approach also provides a more accurate measure for comparison than is the case with a simple number count of stories or even the use of total column centimetres.⁴⁷ It also addresses another, perhaps more important issue, namely whether media coverage of the Metherell affair was event-driven or media-driven? To answer this question the chapter builds on the chronology of events established in chapters four to six to chart media coverage of the Metherell affair over the survey period. The chapter begins by breaking the data down into monthly figures, before providing a day by day analysis. This is in line with the approach adopted with the chronology.

A thematic coverage of the issue begins in chapter eight. This chapter deals with editorial coverage of the issue. Editorial, as opposed to general news, coverage of the issue was selected as the starting point because it contains the official views of a particular newspaper, that is, its stance on an issue. In taking this approach, the author was looking for evidence of attitudinal disparities in coverage between the four newspapers. In particular the focus was on the newspapers' reactions to claims that the behaviour of Greiner and Moore in appointing Metherell to the EPA was corrupt, and how they responded to the justifications used by Greiner and Moore in seeking to account for their behaviour. This chapter is interested in whether the newspapers accepted or rejected the accounts offered by Greiner and Moore. It was also interested in determining whether there was agreement amongst the editorial writers of the four newspapers regarding the outcome of the inquiry process and, in

⁴⁶ That is, the researcher is encouraged to look beyond the total story to consider its component parts, including: (1) text, (2) headlines and (3) photographs, artist impressions or other graphic illustrations, including cartoons. Such a breakdown has not been included in this study, although undertaken by the author, because of the focus on thematic coverage, rather than, for example, a comparison of space allocated to headlines as opposed to text or photographs.

⁴⁷ A simple article count does not provide for the often large discrepancy in total areas devoted to coverage of an issue, or even the fact that some newspapers will run small stories, whilst others will run large stories. Nor does it allow for the fact that some papers - the tabloids, for example - might devote considerable coverage to a story, but that a large proportion of that is headline and photographs, whereas a broadsheet might allocate a similar area, the overwhelming proportion of

particular, whether there was any evidence that the newspapers dealt with allegations of corruption in a ritualistic way. As such it will be building on the work of Andrew Szasz⁴⁸ and Bruce Gronbeck,⁴⁹ both of whom point to evidence of rituals in the coverage of, and attitudes towards, corruption.

A similar approach was adopted in chapter nine, which dealt with general news, comment and opinion pieces. However in this chapter the parameters of the study were extended. Not only was the author interested in comparing coverage of this issue between newspapers, but also coverage within newspapers. This included whether the newspapers allowed for a diversity of views within their news pages, and whether there was an institutional approach to the coverage of this issue. It also sought to determine whether coverage of this issue in general news pages reflected the opinions contained in the editorial columns.

Chapter 10 considers two further issues: (1) the extent to which the public is encouraged to directly participate in this ritual, if that is the appropriate word to use, and (2) public responses to it. Gronbeck suggests that the people "demand to participate in [the] ritualistic deposition".⁵⁰ This statement has particular currency in the context of the Metherell affair, given comments the head of the ICAC, Commissioner Ian Temby QC, made in his first report. Temby suggested that the public had in fact set the pace on this issue, with the media following some time afterwards.⁵¹ This entices questions about the agenda-setting role of the media discussed in chapter three. It also encourages a raft of questions about public responses to the attempted justifications offered by Greiner and Moore, which are explored in the context of the case study.

which is text. A column centimetre count, whilst more effective, does not necessarily allow for the different column widths used by the various newspapers, or even within the same newspaper.

⁴⁸ Andrew Szasz, "The Process and Significance of Political Scandals: A Comparison of the Watergate and the 'Sewergate' episode at the Environmental Protection Agency," *Social Problems* 33, no. 3 (1986): 202-17.

⁴⁹ Gronbeck, "The Rhetoric of Political Corruption."

⁵⁰ *ibid*, 156.

⁵¹ ICAC, *First Report*, 4.

Conclusion

To summarise, the purpose of this thesis is two-fold, to study: (1) how political figures who are charged with breaching public trust in a way that might involve corruption, seek to justify their actions; and (2) how they use the media to justify their conduct to the voting public. The thesis goes beyond these aims, however, to explore also how the media accepts and covers their attempts at justification (and for that matter the responses of their political opponents). In so doing, this thesis provides a study into a range of issues which cross over a number of disciplines. The key issues include leadership, corruption and accountability. Within these broad areas, however, there are a number of other themes, including the question of motive, and how role conflict and role strain can influence the way in which individuals act. Each of these are discussed in the context of the Metherell affair.

Chapter 2

Political corruption and accountability

Introduction

To understand the Metherell affair, and in particular the public and political outrage which ensued, and the disagreement over the labelling of Greiner and Moore's conduct which characterised much of the debate, it is necessary to explore the meaning of the term 'corruption' as it is applied to political behaviour and actions. It is also important to explore the link between standards of conduct and attitudes towards accountability. The purpose of this chapter is: (1) to provide a theoretical overview of the problems inherent in any attempt to arrive at a universally accepted definition of 'political corruption'; (2) to consider what factors people take into account when labelling conduct as corrupt or not; (3) to explore the link between 'corruption' and calls for accountability; and (4) to discuss some of the strategies used to justify conduct which has been labelled 'corrupt' or is considered inappropriate.

The chapter begins by analysing each of the three main definitional approaches to 'corruption'. It will argue that whilst all have their strengths, they also have weaknesses which explain why it is unlikely that agreement over a single definition will ever be reached. Despite this, the chapter argues that on the basis of research undertaken in the US, Canada, Britain and Australia it is possible to understand which factors people take into account when labelling conduct as corrupt or not corrupt.

In part II, the chapter seeks to link the debate over corruption with notions of accountability and responsibility. It will be argued that whilst the principle of accountability underpins our democratic ideals, it is nonetheless a complex issue. This, it will be argued, is due to the fact that

MPs are both politically and legally accountable. Furthermore, it will be argued that the standards of conduct upon which our notions of accountability are based tend to evolve over time, and that these can influence the expectations we have of particular office holders.

In the final section, the chapter looks at the question of motive and justification. This section seeks to expand the discussion about accountability to look at how people charged with corrupt conduct seek to justify their conduct. It will be argued that much of the focus in a debate involving allegations of corrupt or inappropriate behaviour will be on the so-called motives involved. It will also be argued that the accounts offered can influence the way in which the issue evolves and the ability of individuals to manage it. Finally, it will be argued that in seeking to justify their behaviour, individuals will often seek to apply a situational morality and that whilst this may be accepted within a particular institutional environment, it may struggle for acceptance within the broader community.

Understanding corruption

There is a sizeable and growing body of literature which suggests that corruption is a problem which affects all societies, developing and developed alike.¹ However the evidence indicates that what is regarded as corrupt in one country - or even at one time in history - may not be regarded as corrupt in another country or within the same country at a different time. For example, there can be a considerable divide between western attitudes towards corruption and those in developing countries. Conduct which is labelled 'corrupt' according to western standards is often regarded as acceptable in developing countries and even considered to

¹ See, for example, Arnold Heidenheimer, Michael Johnston and Victor Le Vine, eds., *Political Corruption: A Handbook* (New Brunswick, N. J: Transaction Publishers, 1989); M. Levi and D. Nelken, eds., *The Corruption of Politics and The Politics of Corruption* (Oxford: Blackwell, 1996); Gordon L. Clark, Elizabeth Prior Jonson and Wayne Caldw, eds., *Accountability and Corruption: Public Sector Ethics* (Sydney: Allen and Unwin, 1997); P. deLeon, *Thinking About Political Corruption* (New York: M. E. Sharpe, 1993); Dennis F. Thompson, *Ethics in Congress: From Individual to Institutional Corruption* (Washington: Brookings, 1995).

have a positive role to play in the development process.² Despite the different attitudes that exist, however, it is clear that the very concept of corruption embodies a moral quality. As Peter Hay has observed: "... corruption does not refer to a standardised set of activities, but is a term importing a quality of moral condemnation to certain practices."³

Defining 'political corruption'

The debate over a suitable definition for the term 'political corruption' has preoccupied researchers for much of this century, particularly the last 25 years.⁴ Whilst there appears to be general consensus that political corruption involves the misuse of public authority for private gain, there is an on-going debate over the criteria to be used to determine when such authority has been misused or abused.⁵ John Gardiner suggests that the debate is over "... where the boundaries of the concept lie".⁶ According to Gibbons, the problem is one of conceptualisation - of connotation as well as denotation.⁷ In fact researchers differ over whether a single definition is either necessary or desirable.⁸ At least one author has argued that "agreement as to a reasonable definition of political corruption seems, at best, a distant and improbable goal."⁹ Another has argued that "a definition incorporating all the perceptual and normative subtleties is

² M. Johnston, "The Political Consequences of Corruption: A Reassessment," *Comparative Politics* 18, no. 4 (July 1986): 459-77; K. Dolan, B. McKeown and J. M. Carlson, "Popular Conceptions of Political Corruption: Implications for the Empirical Study of Political Ethics," *Corruption and Reform* 3, no. 1 (1988): 3-24; M. Johnston, "Corruption and Political Culture in America: An Empirical Perspective," *Publius* 13, no. 1 (1983): 19-39; P. deLeon, "Public Policy Implications of Systemic Political Corruption," *Corruption and Reform* 4, no. 3 (1989): 193-215; G. E. Caiden and N. J. Caiden, "Administrative Corruption," *Public Administration Review* 37, no. 3 (1977): 302; A. Deysine, "Political Corruption: A Review of the Literature," *European Journal of Political Research* 8 (1980): 447-62.

³ Peter Hay, "Problems in the Analysis of Political Corruption," unpublished PhD, University of Tasmania (1976), v. See also K. M. Gibbons, "Towards an Attitudinal Definition of Corruption," in Heidenheimer, Johnston and LeVine, *Political Corruption: A Handbook*, 165.

⁴ Many texts and journal articles dealing with corruption devote some space to the discussion of this problem, often abandoning the task as too difficult or as incidental to other aspects of the project.

⁵ See for example Kate Gillespie and Gwenn Okruhlik, "The Political Dimensions of Corruption Cleanups: A Framework for Analysis," *Comparative Politics* 24, no. 1 (October 1991): 77-95.

⁶ John A. Gardiner, "Defining Corruption," *Corruption and Reform* 7 (1993): 111.

⁷ Gibbons, "Toward an Attitudinal Definition," 165.

⁸ N. Caiden, "Short changing the Public," *Public Administration Review* 39, no. 3 (1979): 297.

⁹ Gibbons, "Toward an Attitudinal Definition," 165.

probably unattainable."¹⁰ Whether this debate can be resolved seems a moot point - and is not the purpose of this thesis. However it is necessary to canvas some of the main approaches so as to highlight the difficulties that can be encountered when labelling or seeking agreement over the labelling of conduct.

For the purpose of this thesis, three main approaches will be considered. They are (1) formal-legal (or public office); (2) public interest; and (3) public opinion. The debate surrounding these definitions highlights the barriers standing in the way of consensus. As Philp argues:

Each definition faces difficulties over the question of from where we should take the standards or norms of public office or public interest so as to be able to say when action has deviated from this standard.¹¹

The Public Office (formal-legal) approach

The formal-legal (public office) definition regards as corrupt those actions which violate a known standard or rule of behaviour established or sanctioned by a political system.¹² This approach is often regarded as the most precise and reliable.¹³ Its appeal lies in the fact that it can be readily applied and has as its basis identifiable legal norms. The best known and possibly most frequently cited public office definition is provided by Joseph Nye, who defines corruption as:

Behaviour which deviates from the normal duties of a public role because of private-regarding (family, close private clique) pecuniary or status gains, and violates rules against the exercise of private regarding influence. This includes such behaviour as bribery (use of reward to pervert the judgment of a person in a position of trust); nepotism (bestowal of patronage by reason of ascriptive relationship

¹⁰ Johnston, "The Political Consequences of Corruption: A Reassessment," 460.

¹¹ M. Philp, "On Politics and its Corruption," *Political Theory Newsletter* 6 (1994): 1.

¹² This is discussed in detail in John G. Peters and Susan Welch, "Political Corruption in America: A Search for Definitions and a Theory, or If Political Corruption is in the Mainstream of American Politics Why is it not in the Mainstream of American Politics Research?" *American Political Science Review* 72, no. 3 (1978): 974.

¹³ M. Johnston, "Systemic Origins of Fraud, Waste and Abuse," in J. B. McKinney and M. Johnston, eds., *Fraud, Waste and Abuse in Government: Causes, Consequences and Cures* (Philadelphia: ISHI, 1986), 17.

rather than merit); and misappropriation (illegal appropriation of public resources for private-regarding uses).¹⁴

Nye's definition has come under close scrutiny. According to Johnston, the 'normal duties' include obligations and prohibitions placed on the holder of a public office by the law or other formal regulations.¹⁵ 'Private regarding' has also been broadly interpreted to include not just the office holder using his or her position for private or personal gain, but to include one's family or neighbourhood.¹⁶ However, according to Gardiner, it does not cover situations in which the objective is to benefit one's political party.¹⁷ According to this view, personal gain need not be measured solely in financial or monetary terms; it can be more broadly interpreted.

Despite its obvious attractions, this approach is vulnerable. For example, the law still has to be interpreted, and this can produce definitions which are either too broad or too narrow.¹⁸ Significantly, the legal definition can be out of step with public attitudes. In fact Gibbons argues:

[t]here are many political phenomena of significance which would be put aside if strictly legal definitions of corruption held sway. ... Legal definitions have their value, but not to the exclusion of other considerations.¹⁹

This argument is also taken up by Jackson who has suggested that using the law as the standard of corruption supports the contention that everything that is not illegal is permitted:

¹⁴ J. S. Nye, "Corruption and Political development: A Cost-Benefit Analysis," *The American Political Science Review* 61, no. 2 (1967): 419.

¹⁵ M. Johnston, *Political Corruption and Public Policy in America* (Monterey, Calif: Brooks/Cole, 1982), 8.

¹⁶ Gardiner, "Defining Corruption." 112.

¹⁷ *ibid.*

¹⁸ Gibbons, "Toward an Attitudinal Definition," 166; M. Jackson, Elizabeth Kirby, Rodney Smith and Lynn Thompson, "Sovereign Eyes: Legislators' Perceptions of Corruption," *Journal of Commonwealth and Comparative Politics* 32, no. 1 (March 1994): 54. See also Peters and Welch, *Political Corruption in America*, 974.

¹⁹ Gibbons, "Toward an Attitudinal Definition," 166.

The legal foundation of political corruption is simultaneously too narrow and too broad; excluding too much (the unethical but legal) and including too much (the illegal but not unethical).²⁰

Jackson's warning encapsulates the major criticism of this approach - the view that all illegal acts are not necessarily corrupt and all corrupt acts are not necessarily illegal.²¹ Likewise Caiden and Caiden caution:

As long as no confusion exists regarding the standard from which corrupt practices diverge, ie the nature of public duty, corruption may clearly be defined and recognized. Once, however, the public standard is challenged, or regarded as relative to circumstances, then considerable ambiguity enters. Who sets the standard to say what behaviour is acceptable and what is corrupt? What is undue influence? What is misuse of authority? What is public irresponsibility?²²

This theme is further explored by Michael Atkinson and Maureen Mancuso, who suggest that the objective standards adopted in the formal-legal approach: "can be employed only where the public responsibilities of an office-holder have been clearly identified and behaviour inconsistent with these responsibilities has been anticipated."²³ In fact they go so far as to argue that: "where public standards have changed, statute law may constitute an obstacle to the development of widely shared norms".²⁴

The Public Interest approach

Another, rather broader, approach is to define corruption according to the public interest. Under the public interest approach, conduct is said to be corrupt if the public trust or good is betrayed, irrespective of whether the action is illegal or not.²⁵ This approach is generally attributed to Rogow

²⁰ Jackson, "Sovereign Eyes," 54. A similar view is expressed by Peters and Welch in "Political Corruption in America," 974.

²¹ This has been pointed out by a number of researchers, including Peters and Welch, Johnston, and deLeon, the latter arguing that "'corrupt' and 'illegal' are not universal synonyms". See deLeon, "Public Policy Implications," 195.

²² Caiden and Caiden, "Administrative Corruption," 302.

²³ Michael M. Atkinson and Maureen Mancuso, "Do We Need a Code of Conduct for Politicians: The Search for an Elite Political Culture of Corruption in Canada," *Canadian Journal of Political Science* 18 (1985): 404.

²⁴ *ibid.*

²⁵ For example, see Dolan, McKeown and Carlson, "Popular Conceptions of Corruption," 3-24.

and Lasswell.²⁶ It has also been adopted by Carl Friedrich who suggested that:

The pattern of corruption can be said to exist whenever a power-holder who is charged with doing certain things, ie who is a responsible functionary or office-holder, is by monetary or other rewards not legally provided for induced to take actions which favour whoever provides the rewards and thereby does damage to the public and its interest.²⁷

The public interest approach is premised on the belief that corruption is contrary to important social norms and may ultimately threaten the stability of the political system.²⁸ Despite the obvious flexibility which this approach offers, it has been widely criticised. 'Public interest' is an ambiguous term and therefore difficult to define.²⁹ It is often possible to identify multiple or competing public interests, rather than one universally accepted public interest. One of the most potent criticisms of the public interest approach, however, is the argument that it provides politicians with an opportunity to justify almost any act by claiming that it is in the public interest.³⁰ As Jackson et al have argued, this is a difficult claim to verify.³¹ It has also led to the term 'public interest' being devalued.³² Heywood writes that whilst the phrase is linked with the notion of "government *for* the people", frequently it is employed by politicians to give their "views or actions a cloak of moral respectability".³³ Jackson suggests a further weakness:

²⁶ A. Rogow and H. Lasswell, *Power, Corruption and Rectitude* (Englewood Cliffs, N.J: Prentice Hall, 1963).

²⁷ C. J. Friedrich, *The Pathology of Politics* (New York: Harper and Row, 1972), 128.

²⁸ Rogow and Lasswell, *Power, Corruption and Rectitude*, 132-33; and Jackson et al, "Sovereign Eyes," 55.

²⁹ This is not just in the context of understanding political corruption. There is also a wide debate going on among political theorists and philosophers about the meaning of the term. For example, see Glendon Schubert, *The Public Interest* (Glencoe: Free Press, 1960). Schubert argues, page 11, that the concept of public interest: "lies at the heart of democratic theories of government". However he warns that there is a tendency to: "define the public interest as universal, in terms so broad that it encompasses almost any type of specific decision, or else to particularise the concept, by identifying it with the most discrete of policy norms and actions, to the extent that it has no general significance".

³⁰ Peters and Welch, "Political Corruption in America," 975

³¹ Jackson et al, "Sovereign Eyes," 54-67.

³² A. Heywood, *Political Ideas and Concepts: An Introduction*, (Houndsmills, Basingstoke: Macmillan, 1994), 184.

While identifying the public interest plays an important role in the self-understanding of any polity, it is not the sharpest instrument for pin-pointing misdeeds that constitute corruption.³⁴

In fact the major difficulty with the public interest approach is that it can provoke a conflict between social norms and the law. This is explained by Gardiner, who said that according to this view: "[i]f an act is harmful to the public interest it is corrupt even if it is legal; if it is beneficial to the public, it is not corrupt even if it violates the law."³⁵ The problem, according to Peters and Welch, is that behaviour may be proscribed by law as corrupt and yet may be beneficial.³⁶ This view is also expressed by Johnston, who argues that not only is much corruption inconsequential, but that some may even be beneficial to "substantial segments of the community".³⁷

The public interest approach is also said to impose an additional burden on the observer in the form of an obligation to determine what the public interest may be before deciding whether an act is corrupt or not.³⁸ This involves:

[D]efining and achieving consensus on the general good before deviations from it can be ascertained. If many perspectives of 'public good' are current in an open society characterised by pluralist democracy and competing interests, then one can assume multiple views of political corruption.³⁹

As James Scott argues, the use of a public interest approach, while appealing, highlights the difficulties inherent in attempting "... to resolve an essentially normative or ideological question by definition."⁴⁰

³³ *ibid.*

³⁴ Jackson et al, "Sovereign Eyes," 55.

³⁵ Gardiner, "Defining Corruption," 117.

³⁶ Peters and Welch, "Political Corruption in America," 975.

³⁷ Johnston, "Corruption and Political Culture in America," 39

³⁸ This difficulty is highlighted by Johnston, in *Political Corruption and Public Policy in America*, 5-6; Dolan, McKeown and Carlson, in "Popular Conceptions of Political Corruption," 3-24; and Gardiner, in "Defining Corruption," 117.

³⁹ Dolan, McKeown and Carlson, "Popular conceptions of Corruption," 5.

The Public Opinion approach

A third approach, and one which has attracted considerable support in recent years, is to define corruption by reference to public opinion. That is, conduct is corrupt when the weight of public opinion considers it to be so.⁴¹ According to this approach the seriousness of conduct may be mitigated by factors not necessarily recognised in law.⁴²

Obviously this approach is potentially much broader than either the formal-legal or public interest definitions and therefore can generate all sorts of difficulties. However its quest for recognition can be forcefully argued, as Jackson et al suggest: "Since public opinion, understood broadly, determines what becomes law and what dictates the public interest, it has a claim to be the final test for corruption."⁴³

On the down side, it can be argued that this approach suffers from many of the defects which hinder the adoption of a public interest definition. Again it is difficult to identify the public whose opinion is to be decisive. As with the definition of 'public interest', it is often possible to identify multiple publics, beginning with those who support a particular proposal or action on the one hand, and those who oppose it on the other. Even when various opinions have been identified, the question arises which opinion should be adopted?⁴⁴ Writing in the 1930s, Senturia was in no doubt. He believed that this responsibility should fall on the elite for: "[w]here the best opinion and morality of the time, examining the intent

⁴⁰ James C. Scott, *Comparative Political Corruption* (Englewood Cliffs, NJ: Prentice Hall, 1972), 3. Cited in ICAC Research Report No. 1, *Unravelling Corruption: A Public Sector Perspective* (Sydney: ICAC, 1994).

⁴¹ Susan Welch and John G. Peters, "Attitudes of US State Legislators," *Legislative Studies Quarterly* II, no. 4 (November 1977): 447.

⁴² M. Johnston, Right and Wrong in American Politics: Popular Conceptions of Corruption," *Polity* 18, no. 3 (1986): 367-91; M. Johnston, "Right and Wrong in British Politics: Fits of Morality in Comparative Perspective," *Polity* 24, no. 1 (1991): 1-25

⁴³ Jackson et al, "Sovereign Eyes," 55.

⁴⁴ Scott, *Comparative Political Corruption*, 123.

and setting of an act, judge it to represent a sacrifice of public for private benefit, then it must be held to be corrupt."⁴⁵

The shortcomings of views such as Senturia's are identified by Peters and Welch, who suggest that a definition based on public opinion: "... must consider the differences which may exist between the public and political elites in their assessment of appropriate standards of public conduct".⁴⁶ In fact Peters and Welch sum up the difficulty when they argue that: "[w]hat may be 'corrupt' to one citizen, scholar, or public official is 'just politics' to another, or 'indiscretion' to a third."⁴⁷ This is further reinforced by Jackson et al, who acknowledge that while perceptions of corruption are determined by time and place, history and culture, public opinion is not unambiguous.⁴⁸

Despite these concerns, there has been a strong body of research which confirms the thesis that individuals draw on a range of often highly personal factors when labelling conduct as corrupt or not. One of the first theorists to address this question systematically was Arnold Heidenheimer who argued that behaviour could be scaled along a continuum with various acts labelled 'white, grey or black'.⁴⁹ Under Heidenheimer's schema, the term 'black corruption' is applied to conduct which both elite and mass opinion condemn and want to see punished. 'Grey corruption' includes conduct which some elements would want to see punished, but others would not. 'White corruption', on the other hand, includes conduct which majority opinion - both elite and mass - would regard as not sufficiently serious to warrant punishment.⁵⁰

⁴⁵ Joseph A. Senturia, "Corruption, Political," *Encyclopedia of the Social Sciences*, IV (New York: Crowell-Collier-MacMillan, 1930-35), 449. Cited in Heidenheimer, Johnston and LeVine *Political Corruption: A Handbook*, 11.

⁴⁶ Peters and Welch, "Political Corruption in America," 975.

⁴⁷ *ibid*, 974.

⁴⁸ Jackson et al, "Sovereign Eyes," 55.

⁴⁹ Arnold J. Heidenheimer, *Political Corruption: Readings in Comparative Analysis* (New Brunswick: Transaction Books, 1970).

⁵⁰ See Heidenheimer, *Political Corruption: Readings*; also Heidenheimer, Johnston and LeVine, *Political Corruption: A Handbook*.

Heidenheimer's research has provided the stimulus for a range of other studies. The benchmark survey was undertaken by Peters and Welch in the mid 1970s.⁵¹ Peters and Welch identified four factors - (1) the *public official* involved, (2) the *favour* provided by that person, (3) the *pay-off* they received in return, and (4) the *donor* of the pay-off and/or the *recipient* of the favour - which they believed people would take into account when labelling conduct as corrupt or not corrupt.⁵²

Peters and Welch found that:

(1) Acts involving malfeasance,⁵³ misfeasance,⁵⁴ or nonfeasance⁵⁵ which occur during the course of one's public duties are more corrupt than behaviour which occurs outside of one's political duties.⁵⁶

(2) The political nature of one's role has an influence on whether conduct will be considered corrupt or not. Peters and Welch found, for example, that the conduct of a judge or other non-political office holder is more likely to be regarded as corrupt than if the same act is undertaken by a political officeholder. However acts by holders of

⁵¹ Using a mail questionnaire, they surveyed more than 400 US Senators and former Senators. Participants in the survey were asked to label the "marginally ethical" conduct in 10 hypothetical scenarios on a five point corrupt/not corrupt scale. The scenarios were: (1) A presidential candidate who promises an ambassadorship in exchange for campaign contributions (**Ambassador**); (2) A congressman who uses seniority to obtain a weapons contract for a firm in his district (**Weapons contract**); (3) A public official using public funds for personal travel (**Travel**); (4) A Secretary of Defence who owns \$50,000 in stock in a company with which the Defence Department has a million dollar contract (**Defence Stock**); (5) A public official using his influence to get a friend or relative admitted to law school (**Law School**); (6) The driveway of a Mayor's home being paved by the city crew (**Driveway**); (7) A State assembly man, while chairman of the Public Roads Committee, authorising the purchase of land he had recently acquired (**Land sale**); (8) A judge hearing a case concerning a corporation in which he has \$50,000 worth of stock (**Judge**); (9) a legislator accepting a large campaign contribution in return for 'voting the right way' on a Bill (**Right way**); (10) A congressman who holds a large amount of stock in an oil company (worth about \$50,000) working to maintain the oil depletion allowance (**Oil**).

⁵² Peters and Welch, "Political Corruption in America," 974-84

⁵³ 'Malfeasance' is defined as "The doing of an unlawful act." See J. Burke, *Osborn's Concise Law Dictionary*, 6th ed. (London: Sweet and Maxwell, 1976), 211.

⁵⁴ 'Misfeasance' is the "improper performance of a lawful act". See Burke, *Osborn's Concise Law Dictionary*, 221.

⁵⁵ 'Nonfeasance' is defined as "The neglect or failure to do some act which ought to be done." See Burke, *Osborn's Concise Law Dictionary*, 233.

⁵⁶ Peters and Welch, "Political Corruption in America," 976.

public office are likely to be regarded as more corrupt than if the same actions were taken by a member of the public.⁵⁷

(3) An act is less likely to be viewed unfavourably if the donor is a constituent rather than a non constituent. They say that this links back to the idea of constituency service which helps to legitimise some actions. However the act is more likely to be considered corrupt if the donor is one person, rather than a company or a group of people.⁵⁸

(4) Private or non-constituency favours will be regarded as more corrupt than those which are seen to convey a large public benefit or those undertaken on behalf of a constituent. Also, acts which are undertaken during the course of one's routine duties are less likely to be regarded as corrupt than those which are seen as being in some respects extraordinary.⁵⁹

(5) The larger the pay-off, the more corrupt the act is perceived to be. Acts which confer an immediate benefit on the public official are more likely to be regarded as corrupt than those in which the benefits are seen to accrue long term. Finally, perception of an act is influenced according to whether the pay-off is construed as specific or general. There is more likelihood of an act being considered corrupt if it involves money or services rendered, than if it were for future support or goodwill. For example, non campaign acts are more likely to be construed as corrupt than campaign acts.⁶⁰

Peters and Welch's study has been replicated in a number of other countries, including Canada⁶¹ and Australia.⁶² In their Canadian study,

⁵⁷ *ibid.*

⁵⁸ *ibid.*, 977.

⁵⁹ *ibid.*

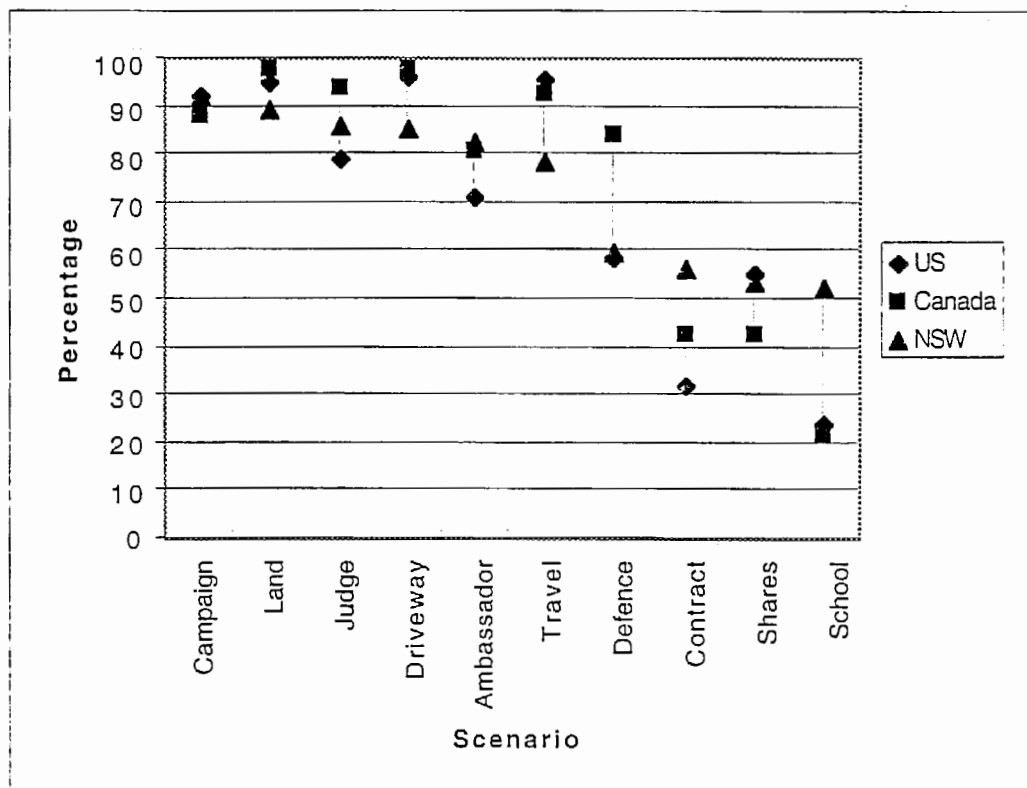
⁶⁰ *ibid.*, 977-78.

⁶¹ Atkinson and Mancuso, "Do We Need a Code of Conduct?" 459-80

⁶² Jackson et al, "Sovereign Eyes," 54; M. Jackson and R. Smith, "Inside Moves and Outside Views: An Australian Case Study of Elite and Public Perceptions of Political Corruption," *Governance* 9, no. 1 (January 1996): 23-42.

Atkinson and Mancuso reaffirmed Peters and Welch's findings across the majority of scenarios. The Australian studies, whilst generally endorsing Peters and Welch's findings, showed there were differences between perceptions of corruption amongst legislators from different countries. In the Australian studies, Jackson et al found that there was a greater uniformity of perception amongst NSW legislators than either their American or Canadian counterparts. That is, US and Canadian MPs used more of the continuum when classifying behaviour than did their Australian counterparts.⁶³ However whilst they were more likely to label actions as corrupt, the NSW MPs were less condemnatory of conduct at the top end of the continuum than the others. According to Jackson and his colleagues, the NSW MPs appeared more tolerant at the top end of the scale and less tolerant at the bottom. The differences are reflected in Chart 2.1 (below):

Chart 2.1: MPs' perceptions of corrupt conduct



Adapted from Jackson and Smith, 1996

⁶³ The wording of these scenarios was adjusted slightly to make them more relevant to Australian MPs.

According to the study, there was greater agreement amongst US and Canadian MPs on the one hand, and NSW MPs on the other at the bottom end of the scale than at the top end. Jackson and his colleagues attributed the differences to cultural, political and constitutional factors.⁶⁴ The Australian study also asked how the MPs believed other public officials and members of the public would label the conduct in each of the scenarios. In seven out of the 10 scenarios the NSW MPs indicated that public officials were more likely to label the particular conduct as corrupt.⁶⁵

In a later study, Jackson and Rodney Smith reworked the original data to test the usefulness of Heidenheimer's black-grey-white typology. To achieve this, they compared the initial results with the findings of a second survey which sought the reactions of members of the public to the original scenarios. The results are contained in Chart 2.2 (overleaf).

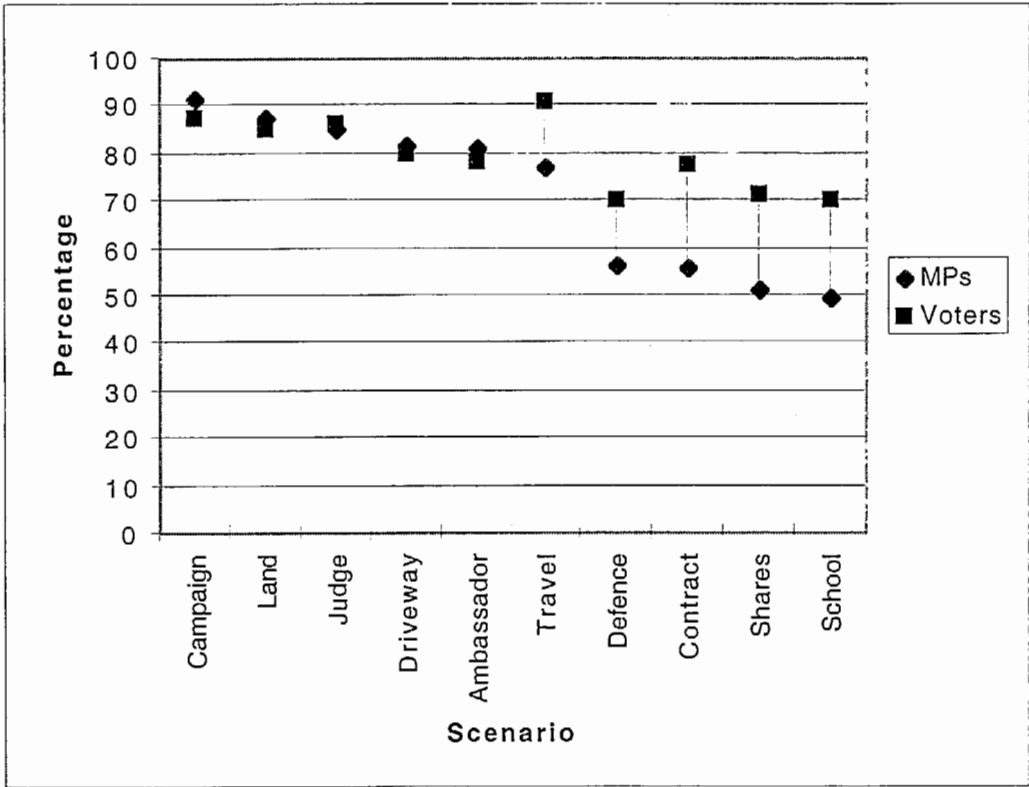
According to Jackson and Smith, the results support the argument that voters and politicians can differ in their attitudes towards, and thus labelling of, conduct. In this case, where voters labelled all of the scenarios black, politicians are able to discern shades of grey. Whilst there were no statistically significant differences at the upper end of the continuum, there were at the bottom end. The survey found that the range for voters was from 90.8 percent (travel) down to 70.3 percent (defence and school). For MPs on the other hand, the range was from 91.4 percent (campaign) down to 49.5 percent (school).

As the chart shows, voters classified the scenarios in a narrower band than did the MPs. Jackson and Smith argued that whilst Peters and Welch's four dimensions of corruption explained the ordering of scenarios by both MPs and voters, they did not account for the wider range of responses by MPs or for the number of significant differences

⁶⁴ Jackson said that the greater sensitivity of Australian MPs to the judge scenario could be attributed to the fact that unlike American judges, Australian judges are appointed not elected. There is also the belief that in Australia the judiciary is regarded as apolitical. In relation to the driveway scenario, they said that Australians seem to have a greater awareness of, and perhaps more tolerance of, local government than is the case in the US and Canada.

identified.⁶⁶ They suggest that to understand this it is necessary to apply Johnston's insider-outsider argument which suggests that MPs as insiders are likely to develop informal rules which help to guide their behaviour.⁶⁷ These rules will only be brought to the attention of outsiders if the behaviour is questioned.⁶⁸ According to Jackson and Smith, outsiders will interpret such behaviour through the use of a morality which is based on their own experiences.⁶⁹ Whereas MPs seek to justify some behaviour or actions in a functional sense - such as "just doing good political business", outsiders who do not appreciate how the system works will apply a different morality.⁷⁰ This is discussed further in part two of this chapter.

Chart 2.2: Responses of NSW MPs and voters compared



Adapted from Jackson and Smith, 1996

⁶⁵ Jackson, et al, *Sovereign Eyes*, 64.

⁶⁶ Jackson and Smith, "Inside Moves," 35.

⁶⁷ *ibid*, 28, 34-35.

⁶⁸ Johnston, "Right and Wrong in American Politics," 371-4.

⁶⁹ Jackson and Smith, "Inside Moves," 28.

⁷⁰ *ibid*, 35.

Jackson and Smith concluded that the study supported Heidenheimer's black-grey-white typology. Furthermore, they argued that the distinction between black and grey corruption is not legality as argued by Gibbons,⁷¹ but Peters and Welch's four dimensions (the public official involved, the favour provided, the pay-off received in return and the donor of the payout and/or the recipient of the favour).⁷² They said that the more of these dimensions a scenario features, the more likely it is to be labelled black corruption; the fewer it possesses, the greater the likelihood that it will be labelled grey.⁷³

These findings have been strengthened by studies of public attitudes undertaken by Johnston in the US and Britain and the ICAC in Australia. Johnston found that not only are citizens likely to judge public officials more harshly than they would private individuals, but that people do not base their assessments of conduct on notions of legality alone. Johnston said that judgments are also influenced by the size and type of stakes, mitigating circumstances, motives and the identity of both the perpetrators and the victims.⁷⁴

Like Johnston, the ICAC found that some respondents did take the circumstances of an event (motives and reasons etc) into account when deciding whether to label conduct corrupt or not. Significantly, it also found that respondents did not restrict their definitions of corruption to (1) behaviour which is illegal; (2) conduct for which the ends do not justify the means; or (3) that which does not constitute common practice.⁷⁵ Whilst arguing that people were likely to be "idiosyncratic" when labelling conduct, the ICAC concluded that there was likely to be more consensus on actions which involved a direct financial gain or illegality than those scenarios in which the gain was less direct.⁷⁶ However it found that opinion tended to be divided when it came to

⁷¹ Gibbons, "Toward an Attitudinal Definition," 165-71.

⁷² Jackson and Smith, "Inside Moves," 39.

⁷³ *ibid.*

⁷⁴ Johnston, "Right and Wrong in American Politics," 367.

⁷⁵ ICAC, *Unravelling Corruption: A Public Sector Perspective*,

⁷⁶ *ibid.* See also ICAC, *Summary Report*, 6.

labelling conduct which involved a breach of rules on the one hand, but a reasonable outcome on the other.⁷⁷

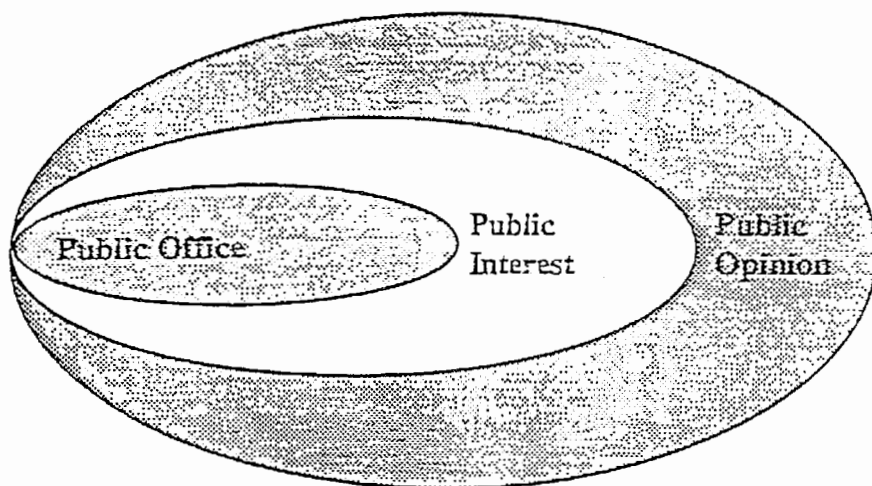
The ICAC findings support the conclusions to be drawn from the Peters and Welch, Jackson, Atkinson and Mancuso, and Johnston studies that “outsiders” apply a more stringent test when judging the conduct of public officials (both elected and appointed) than they do when considering the conduct of private individuals.⁷⁸ As such these studies highlight the difficulties involved in trying to categorise behaviour as corrupt or not corrupt. In the words of Doian et al: “reaction to and tolerance of corruption can involve intensely personal feelings and beliefs; tolerance and condemnation emerge from the depths of

⁷⁷ The ICAC surveys are important in another respect, asking people whether they believed public sector standards were or should be the same as private sector standards. In a 1995 survey, nearly two thirds (64 percent) said that the standards should be the same in both the public and private sectors, with 29 percent indicating that they should be higher in the public sector. Only five percent suggested that standards should be higher in the private sector than public sector, with 2 percent qualifying their answer or responding that they did not know. See, ICAC, *Community Attitudes Towards Corruption and the ICAC, 1995* (March, 1996); also ICAC, *Community Attitudes to Corruption and the ICAC, 1996* (May, 1997): 6-13.

⁷⁸ A number of the studies discussed above also questioned whether background factors such as age, sex, region, income, education, length of employment, supervisory status, professional qualifications and political ideology influenced the labelling of conduct. The results were somewhat conflicting, thereby suggesting that it is difficult to draw hard and fast conclusions which can be applied beyond particular scenarios or even defined geographical boundaries. Peters and Welch, for example, found that the length of one’s political experience, regional location, sex, the urban character of an electorate and ideology had a “modest effect” on attitudes towards the scenarios used in their study. They found that male MPs were more tolerant of marginally ethical conduct than female legislators. MPs who had served for more than 12 months, or had previously been in public office, were more tolerant than newcomers, with legislators from smaller towns being more accepting of marginal behaviour than those from larger ones. Also, they found that higher educated individuals showed a greater tolerance than those with less formal education. Finally, MPs who considered themselves liberal, were less tolerant than the conservatives. These findings are summarised in *Unravelling Corruption*, 20-21. The urban/rural divide was also identified as a factor by Atkinson and Mancuso and Jackson et al. The latter found that Sydney-based MPs were more likely to judge conduct corrupt than those from rural areas. Whilst Peters and Welch argued that people with higher education appeared more tolerant of corruption, than those with less formal qualifications, Jackson and Gardiner found the opposite to be the case. They found that the higher one’s education levels, the less tolerant they would be of conduct. Whereas Gardiner suggested that people become more tolerant as they get older, Jackson et al, however, found that respondents in the under 40 and 60 plus age groups were more likely to label conduct corrupt than respondents in the mid group. The ICAC survey on the other hand found that it was difficult to predict perceptions of corruption based on background factors (in this case age, education, length of employment, supervisory status, salary level and gender). It found that the responses of demographic sub groups varied according to the scenario.

individual subjectivity."⁷⁹ It is obvious that a definition which is based solely on social conceptions of corruption is impractical, although as Peters and Welch argue, definitions of corruption are not mutually exclusive. Public interest and public opinion criteria are embedded in legal norms which sanction certain behaviour as corrupt. The nature of this relationship is outlined in figure 2.1 below.

Figure 2.1: Definitional approaches to corruption



This diagram highlights the extent to which the various definitional approaches can overlap. Obviously the degree to which the different approaches do overlap is not fixed, and may vary according to (a) the situation being analysed; and (b) the factors individuals take into account when judging conduct. As the above diagram shows, public office definitions are likely to be much tighter than either public interest or public opinion approaches, given that they are based on formally defined, often legal, criteria. Further, the public opinion approach is likely to be the broadest of the three and more likely to accommodate the different, often highly personal factors, people take into account when labelling conduct. The public interest approach is likely to fit somewhere in between. The diagram highlights the difficulty involved in arriving at a definition of 'corruption' or 'corrupt conduct' which can universally be

⁷⁹ Dolan, McKeown and Carlson, "Popular Conceptions of Corruption," 7. This view is also reflected in the writings of Steven Chibnall and Peter Saunders. "World's Apart: Notes on the Social Reality of Corruption," *British Journal of Sociology* 28, no. 2 (1977): 138-54.

applied to behaviour within or between societies and at the same time satisfy all people.

Accountability and corruption

As the preceding discussion shows, corruption can mean different things to different people, particularly to people at different times or in different cultures. A primary reason for this has to do with our expectations regarding the relationship between public figures and the citizens they have been elected to represent. These expectations are framed by our attitudes towards accountability, which has long been considered one of the fundamental tenets of liberal democratic thinking. In Westminster systems its origins can be found in the twin notions of representative and responsible government. Central to these principles is the belief that political power is held in trust for and on behalf of the people by public officials, and that it is not to be abused or misused.⁸⁰ This is the fiduciary principle and, according to Paul Finn, it provides the basis for the most important relationship in our society, that between the community and the State, its agencies and officials.⁸¹

The fiduciary principle is based on the premise that public office carries with it both rights and obligations. The former is catered for by the notion of responsibility; the latter by that of accountability. According to John Uhr:

Both terms refer to vital features of duly constituted government. Accountability constrains and fetters official discretion, while responsibility releases discretion. Accountability is about compliance with authority, whereas responsibility is about empowerment and independence. Accountability is the negative end of the same band in which responsibility is at the positive end. If accountability is

⁸⁰ Paul Finn, "The Abuse of Public Power in Australia: Making Our Governors our Servants," Academy of the Social Sciences in Australia, 1993 Cunningham Lecture, Canberra (November 16, 1993): 4-5. See also Joseph Zimmerman, *Curbing Unethical Behaviour in Government* (Westport: Greenwood Press, 1994), 1; Kathleen Clark, "Do We Have Enough Ethics in Government Yet? An Answer From Fiduciary Theory," *University of Illinois Law Review* 1 (1996): 57-102.

⁸¹ Paul Finn, "Integrity in Government," *Public Law Review* 3 (1992): 243-57).

about minimising misgovernment, responsibility is about maximising good government.⁸²

The two concepts are inextricably linked and are often used interchangeably, although as Uhr notes, they are not synonyms.⁸³ The nature of the relationship is captured by Freckleton and Selby, who define accountability as the "obligation to answer for a responsibility which has been conferred".⁸⁴ Harman, while acknowledging that it is a somewhat "elusive term for which there is no agreed definition", offers the following: "... accountability is an obligation on public figures to report on, justify, and be judged for actions taken in an official capacity when called upon to do so by those with the necessary authority."⁸⁵ A similar view is expressed by Crable, who argues that accountability: "does not entail an actual explanation or defence of behaviour; it simply refers to a constant liability or potential need for such explanation".⁸⁶ According to Uhr, those obligations are "... owed by the powerful to the powerless".⁸⁷ It is the notion of accountability as an obligation to account for one's actions if or when called upon to do so which this thesis is interested in.

Accountability mechanisms

The nature of accountability is problematic. Accountability can be pursued through different mechanisms - legal and political. These mechanisms are detailed in figure 2.2 (overleaf). The diagram shows how, under the Westminster model as adopted in Australia, the Executive is drawn from

⁸² John Uhr, "Redesigning Accountability," *Australian Quarterly* 65 no. 2 (1993): 4.

⁸³ *ibid*, 3.

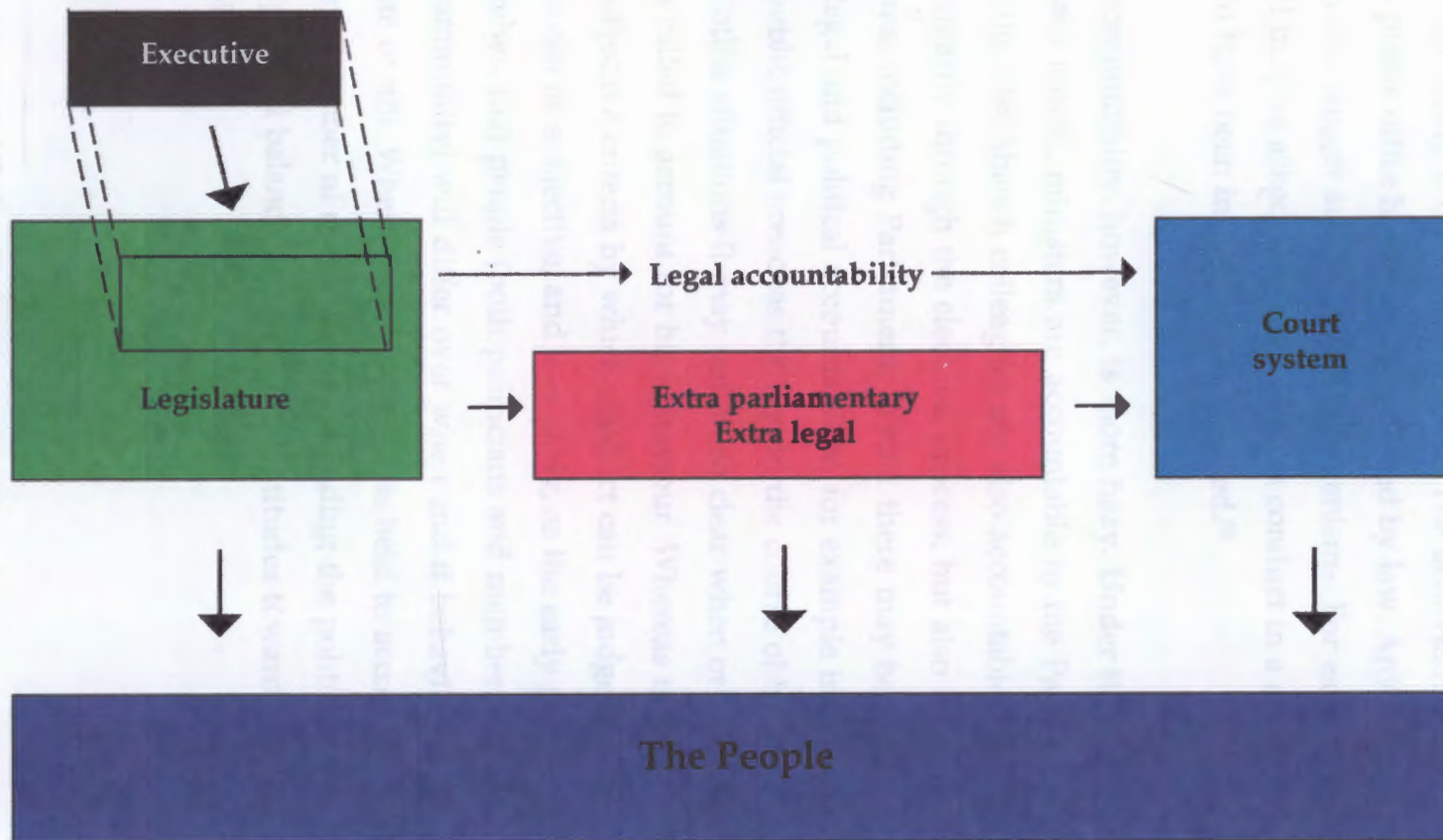
⁸⁴ I. Freckleton and H. Selby, "Police Accountability," in M. Findlay and R. Hogg, eds., *Understanding Crime and Criminal Justice* (Sydney: Law Book Co., 1988). Cited in M. Findlay, "The Ambiguity of Accountability Relationships of Corruption Control," *Australian Quarterly* 65, no. 2 (Winter 1993): 75.

⁸⁵ Elizabeth Harman, "Accountability Challenges for Australian Governments," *Australian Journal of Political Science* 29, no. 1 (1994): 4. Bruce Stone, however, takes issue with aspects of Harman's argument. See Bruce Stone, "Understanding Accountability: A reply to Harman," *Australian Journal of Political Science* 29, no. 2 (1994): 361-5, and Harman's reply "A rejoinder to Stone," in the same edition at pages 366-8.

⁸⁶ Richard E. Crable, "Ethical Codes, Accountability and Argumentation," *Quarterly Journal of Speech* 64 (1978): 26.

⁸⁷ Uhr, "Redesigning Accountability," 2.

Figure 2.2: Accountability explained



the Legislature. That is, ministers are simultaneously members of the Executive and the Legislature. Ministers (in fact all Members of Parliament) are subject to both legal and political accountability mechanisms. The nature of this relationship is highlighted by the arrows. Legal accountability is defined by statute. The behaviour of individuals, including public office holders, is proscribed by law. Any detected breaches of the law can trigger accountability mechanisms. For example, the individual may be asked to account for his conduct in a court of law and, if found to have been in breach, is penalised.⁸⁸

Political accountability, however, is more hazy. Under the Westminster model, ministers are accountable to the Parliament. They and their backbench colleagues are also accountable to the public, primarily through the electoral process, but also through other mechanisms, including Parliament. Whilst there may be an overlap between legal and political accountability, for example in situations where a public official breaches the law in the course of his public duties, in other situations it may not be so clear when or if a politician should be called to account for his behaviour. Whereas the law provides objective criteria by which conduct can be judged, in politics the criteria can be subjective, and it is likely, as the early part of this chapter shows, that people (both politicians and members of the broader community) will differ over when and if behaviour is appropriate or not. Whether or not an MP is held to account can also depend on a number of other factors, including the politics of the issue, the political balance of power, and attitudes towards role responsibilities.

⁸⁸ Under the Constitution, MPs found guilty of particular offences are ineligible to hold political office. See, for example, Sections 43-45. Under s45, MPs can become ineligible if they are declared bankrupt, or if they accept an honorarium for services rendered to the Commonwealth, or for services rendered in the Parliament for any person or organisation. Under the Commonwealth Electoral Act, MPs or candidates who are convicted of bribery or undue influence (or attempts thereof) during an election campaign are ineligible to hold a seat or contest an election for a period of two years (see s211). For further information on the disqualification of MPs, see J. R. Odgers, *Australian Senate Practice*, 5th ed., (Canberra: AGPS, 1976), 118-19.

The latter is of particular interest in situations involving apparent ethical breaches by public figures. According to Finn, there can be disagreement or confusion over the responsibilities of different roles. The difficulty is that the obligations of office may not be clear-cut or well defined. Often public office holders are granted enormous discretion in defining and executing their official responsibilities. As Vogelsang-Coombs and Bakken argue: "public figures exercise discretion in an environment characterised by moral ambiguity and political conflict."⁸⁹ This confusion can extend beyond members of the public to include public officials, many of whom do not understand the constitutional nature and responsibility of their roles.⁹⁰ Invariably positions involving some responsibility also include an element of discretion. It is in the interpretation of the discretion that the scope for conflict can arise.

Building expectations

Our expectations of public officials appear to differ according to the nature of the office they hold. In the case of elected public figures we expect them to aspire to, and to maintain, higher ethical standards than we would require of ordinary people. Zimmerman argues that "elected officials have special responsibilities to promote and uphold the highest ethical standards by serving as role models".⁹¹ According to Finn, role and standards are inextricably linked and the standards imposed must be suited to the role of the official to be regulated.⁹² However he said that in setting appropriate standards of conduct at least three separate, often conflicting, sets of interest have to be weighed and valued. These are (1) the public interest; (2) the interests of the Government; and (3) the interests of officials both as officials and as members of the public.⁹³

⁸⁹ Vera Vogelsang-Coombs and Larry A. Bakken, "The Conduct of Legislators," in James S. Bowman and Frederick A. Elliston, eds., *Ethics, Government and Public Policy: A Reference Guide* (New York: Greenwood Press, 1988), 82.

⁹⁰ Finn, "The Abuse of Public Power," 21.

⁹¹ Zimmerman, *Curbing Unethical Behaviour in Government*, 4.

⁹² Finn, "Integrity in Government," 254.

⁹³ *ibid*, 255.

Finn argues that our attitudes are influenced by what he calls role expectations.⁹⁴ In sociological terms, these expectations can be linked to an individual's 'role-set'. This is the complement of role relationships people are involved in by virtue of a particular position they occupy, for example that of a Premier. In the case of an Australian Premier the role-set can be extensive. A simplified version of the role set is expressed diagrammatically in figure 2.3 overleaf.

Each of the groups identified in this diagram would have particular expectations of the Premier, depending on their relationship with him. This creates a potential difficulty in that the Premier can often face conflicting and contradictory demands from different members of his or her role set. According to William Goode:

[t]he individual is thus likely to face a wide, distracting, and sometimes conflicting array of role obligations. If he conforms fully or adequately in one direction, fulfilment will be difficult in another.⁹⁵

The likely result of this, he observes, is 'role strain'.⁹⁶ Role strain can take a number of forms. Sam Sieber suggests that it can manifest itself as either (1) role overload or (2) role conflict.⁹⁷ By role overload is meant the situation in which an individual's role obligations increase to the point that time prevents him or her from undertaking them all. Ultimately the role occupant will have to choose between roles and will decide to fulfil some to the detriment of others.⁹⁸ Role conflict, on the other hand, refers to the situation in which the role occupant knows that the expectations of some role partners conflict, and that by meeting the expectations of one s/he will be violating the expectations of another.

⁹⁴ *ibid.*, 254.

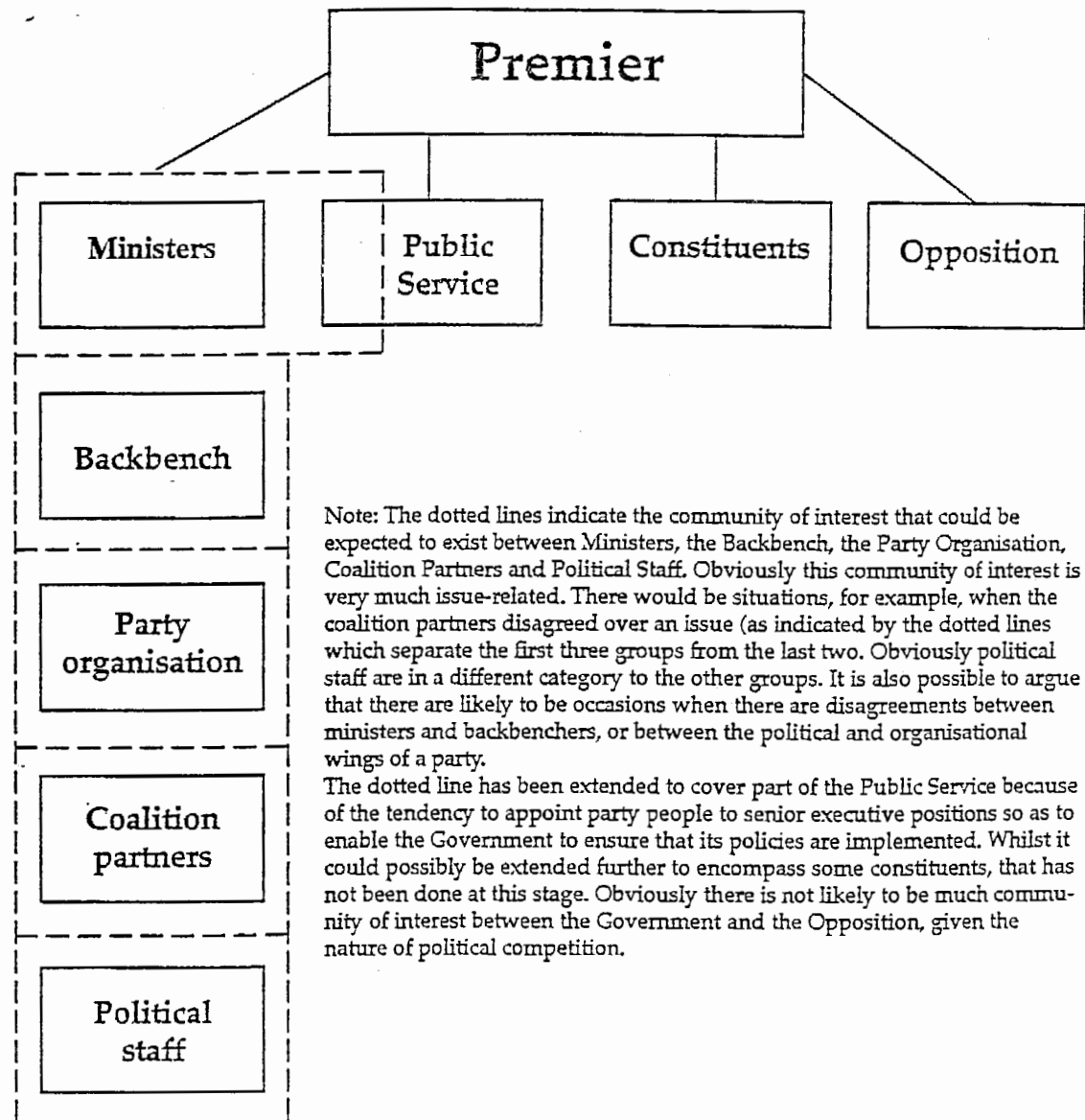
⁹⁵ William J. Goode, "A Theory of Role Strain," *American Sociological Review* 25, no. 4 (August 1960): 485.

⁹⁶ *ibid.*, 484-5.

⁹⁷ Sam D. Sieber, "Toward a Theory of Role Accumulation," *American Sociological Review* 39, no. 4 (August 1974): 567.

⁹⁸ Jackson Toby refers to 'hierarchies of role obligations,' that is doing something rather than something else. See J. Toby, "Some Variables in Role Conflict Analysis," *Social Forces* 30, no. 3 (1952): 324.

Figure 2.3: Illustrated role set of an Australian State Premier



In politics, the likelihood of role conflict is almost inevitable. In the case of the Premier, or other head of government, there is the possibility of a conflict between the expectations of constituents on the one hand, and members of his political party (both parliamentary and organisational), on the other.⁹⁹ Constituents would generally expect the Premier to honour his or her election promises and to act in the public interest or for the public good. Political colleagues, on the other hand (and possibly some constituents), would be more inclined to support a decision not to implement previously announced policies if it enhanced the Government's prospects of staying in office. Obviously MPs and even constituents would differ over what behaviour on the part of political leaders is acceptable or not. As Mancuso suggests: "[o]n many important issues there is stark dissensus among MPs as to what constitutes acceptable behaviour".¹⁰⁰ Some may be prepared to give the leader almost a free rein if the ultimate goal of winning or retaining government is achieved, whilst others would be less supportive and may in fact take the view that one has a greater obligation to honour election promises than to discard or breach them so as to stay in office. Obviously the attitudes of MPs would depend on whether they were in government or coalition with the leader, or whether they were in opposition to that person (either as part of another party or as an independent). They are less likely to publicly support the actions of a leader against whom they are opposed, than if he or she was one of their own. That simply reflects the conflictual nature of politics, and may have little to do with their personal attitudes towards the conduct in question.

Goode suggests that there is a 'role price' which helps the individual weigh up these obligations.¹⁰¹ He said the role price is influenced by three

⁹⁹ Of course there is the other issue which Burke discusses, and that is the role expectations which attach to particular types of representative. This could vary according to whether the MP sees himself or herself as a delegate, trustee or politico. This distinction is not central to this thesis, however for a discussion of Burke's typology see D. Lowenstein, "Political Theory and the Intermediate Theory of Politics," *UCLA Law Review* 32 (1985): 784-851.

¹⁰⁰ Maureen Mancuso, "Ethical Attitudes of British MPs: A Typology," *Parliamentary Affairs* 46, no. 2 (April 1993): 179.

¹⁰¹ Goode, "Role Strain," 489.

interacting factors: (1) the role occupant's pre-existing or autonomous norm commitment - his desire to carry out the performance; (2) his judgment as to how much his role partner will punish or reward him for his performance; and (3) the expected reaction from important reference groups to his behaviour and the role partner's attempts to make him perform adequately.¹⁰²

In the case of a political leader and in the context of the controversy generated in Australia by the corruption inquiries of the 1980s and 1990s, norm commitment might be reflected in terms of the role occupant's previously stated attitudes towards public sector ethics or ministerial conduct generally. His perception of how role partners will punish or reward him for undertaking a particular decision will obviously depend on the nature of the relationship. For example, in the case of the relationship between a leader and his ministers, or a leader and his backbench, the question of reward and punishment can be measured in terms of the support he receives from colleagues, both in the party room and publicly once the decision is announced. On the part of constituents, reward and punishment can be measured in terms of electoral support granted or withdrawn at the next election. More immediately, public responses can be found in the results of opinion polls which are regularly published in the media. These can deal with a range of variables, including reactions to particular policies, comparisons of party leaders, voting intentions, and occupational honesty and ethics ratings.¹⁰³ Finally,

¹⁰² *ibid.*

¹⁰³ These can provide an important assessment of the current political mood, although political parties are generally loathe to attach too much public importance to the results or fluctuations therein in the case of on-going surveys. One on-going poll which has caused acknowledged concern amongst MPs is an annual honesty and ethics survey which is conducted by the Morgan Research Centre and published in the *Bulletin* magazine. The survey has found that the honesty and ethics rating of MPs, whilst traditionally low, has fallen during the past 20 years. The survey found that in 1976 19 percent of people ranked federal MPs "very high" or "high" in terms of honesty and ethics (state MPs were at 21 percent). By 1996 only 13 percent of people ranked federal MPs "high or very high" (State MPs were down to 12 percent). In 1996 federal MPs ranked 17 out of 25 occupations assessed and state MPs equal 18th. Their honesty and ethics rating compared with 87 percent for nurses, 80 percent for pharmacists and 72 percent for doctors. See "Nurses Rate Highly for Ethics and Honesty," *Bulletin*, April 30, 1996, 38. A separate poll found that 91 percent of people believed federal politicians twisted the truth to suit their own purposes, 79 percent agreed with the statement that federal politicians could not be trusted to keep election promises and 67 percent disagreed with the statement that federal

the esteem or opprobrium which the whole issue generates can be measured in terms of media reactions. The media's response can be significant in an agenda-setting or agenda-building sense in that it has the ability to influence how other groups respond to the decision.

It is easy to understand how these competing obligations may lead to role strain. However politicians can seek guidance from a number of sources. Increasingly, they can refer to codes of conduct. These are frequently drafted in line with community expectations, or at least the politicians' perceptions thereof, and can cover a wide range of situations. However as the introduction to the ministerial code of conduct introduced by the Greiner Government in NSW states: "One cannot anticipate and make provision for every contingency which can raise an ethical issue for Ministers."¹⁰⁴ Despite this, a number of Australian State governments have heeded the calls for codes of conduct to be introduced. In some cases the initial response was to introduce ministerial codes of conduct, perhaps reflecting the vulnerability of these positions.¹⁰⁵ Some states have also introduced, or are in the process of framing, codes of conduct which will apply to MPs generally.¹⁰⁶ Not only that, but there has also been renewed focus on codes of conduct for public servants and the professions.¹⁰⁷ This has led to the 1990s being referred to as the "decade of ethics".¹⁰⁸

politicians usually tell the truth. See K-A. Walsh and N. Richardson, "Politicians: How Low Can They Go?" *Bulletin*, September 12, 1995, 14-17.

¹⁰⁴ NSW Government, "Code of Conduct for Ministers of the Crown," March 1988, 1.

¹⁰⁵ These included NSW, Queensland and Western Australia.

¹⁰⁶ The Tasmanian Government introduced a Code of Conduct for MPs in 1996; the Queensland Government announced in 1994 that it was looking at extending the code to MPs generally. In 1994 the NSW ICAC released a discussion paper on a code of conduct for MPs, and in October 1997 the Standing Ethics Committee of the NSW Parliament published a report on a draft code of conduct for MPs. A draft code was released for public comment in April 1988. Federally, the House of Representatives introduced a Register of Pecuniary Interests for MPs in 1989.

¹⁰⁷ Federally, the Media Entertainment and Arts Alliance has been reviewing the Code of Conduct for journalists. In 1997 it released a report entitled *Ethics in Journalism* (Melbourne: MUP, 1997) to promote discussion on this issue. There have also been a number of recent texts which had dealt with this issue. For example see Margaret Coady and Sidney Bloch, eds, *Codes of Ethics and the Professions* (Melbourne: Melbourne University Press, 1996). On codes of conduct generally, see N. Preston, "Can Virtue be Regulated? An Examination of the EARC Proposals for a Code of Conduct for Public Officials in Queensland," *Australian Journal of Public Administration* 51, no. 4 (1992): 410-15.

Ministers under the Westminster system, for example, are also guided by the conventions of collective and individual ministerial responsibility. Under the doctrine of individual ministerial responsibility, ministers are accountable to the Parliament for the actions of departments under their control. In serious cases of departmental or personal fault, tradition required the Minister to make the ultimate sacrifice to Parliament and resign. However following the rapid growth in the size and complexity of government during the late 19th century and the emergence of political parties in the 20th century, the doctrine of individual ministerial accountability appears to have lost much of its force. The occasions on which a minister is expected to resign because of departmental fault, especially arising from situations of which he was unaware, are now rare.¹⁰⁹ Instead, the doctrine has been somewhat modified, that is watered down, to the extent that the emphasis is now on ministerial answerability rather than accountability.¹¹⁰ Under this approach, the Minister is expected to satisfy Parliament that the appropriate action has been taken to resolve the problem and ensure that it does not recur.

The other major check on the executive - the doctrine of collective ministerial responsibility - has, to a certain extent, also failed its original purpose. Rather than being used to hold the government to account for particular policies or actions, it has become more of a shield behind which the executive allows individual ministers who are the subject of parliamentary or public wrath to hide. This too can be attributed to the growth of political parties. The effect of this has been a shift in the power balance between Parliament and the executive. Whereas traditionally Parliament had been supreme, and able to hold individual ministers and governments to account, the growth in political parties has seen the locus of power shift in favour of the executive.

¹⁰⁸ Michael Smith, "Accountability: the Writing on the Wall," *Australian Journalism Review* 14, no.1 (1992): 27.

¹⁰⁹ Diana Woodhouse, "Ministerial Responsibility in the 1990s: When do Ministers Resign," *Parliamentary Affairs* 46, no. 3 (July 1993): 277-92.

¹¹⁰ See for example, Geoffrey Marshall, "The Evolving Practice of Parliamentary Accountability: Writing Down the Rules," *Parliamentary Affairs* 44, no. 4 (October 1991): 460-69.

This has meant that Parliament has either been unable to, or struggled to, perform its traditional accountability functions.¹¹¹ Certainly there have been very few instances in recent history in which an Australian Parliament, at either a federal or state level, has been able to force a minister to resign over the handling of his or her portfolio. The resignations when they have occurred have been extracted because of the perceived political cost to the government which flows from the minister's misconduct, be it personal or political.¹¹² Generally, however, Governments have used the principle of collective responsibility to protect ministers who come under attack from the opposition or public over a particular issue.¹¹³ In part this has contributed to the perception that members of Parliament are driven by self interest rather than public service.¹¹⁴ It may also have helped perpetuate the "... conception of government as the public's master and not its servant".¹¹⁵

¹¹¹ The exceptions are when independents or minor parties hold the balance of power in a Parliament. This is becoming an increasing phenomenon in Australian Parliaments.

¹¹² Examples could include the resignations of Ros Kelly and Graham Richardson; and more recently Jim Short, the Assistant Treasurer, Geoff Prosser, the Minister for Small Business and Consumer Affairs, and Brian Gibson, the Parliamentary Secretary to the Treasurer in the Howard Government. Ros Kelly was forced to resign over the so-called 'sports Rorts Affair' and Graham Richardson, a key minister in the Hawke and Keating Governments was forced to resign over the so-called 'Marshall Islands Affair'. All three Howard Government appointees were forced to resign because of a perceived conflict of interest between their ministerial duties and their non-parliamentary interests.

¹¹³ For an excellent analysis of this topic, see Diana Woodhouse, *Ministers and Parliament: Accountability in Theory and Practice* (Oxford: Clarendon Press, 1994).

¹¹⁴ This perception has also been fuelled by the recent debate over MP travel allowances. For example, Senator Mal Colston was forced to resign as Deputy President of the Senate after allegations that he had claimed travel allowances to which he is not entitled. Colston, Bob Woods, a former NSW Liberal Senator who resigned over another matter, and former Western Australian MP Noel Crichton-Browne, have all been charged with misusing their travel entitlements and, at the time of writing, were to face trial. In NSW the ICAC has responded to claims that MPs were misusing travel entitlements by conducting an inquiry. The Commission handed down its findings in two parts. The first report was entitled *Investigation into Parliamentary and Electorate Travel*, and was published in April 1998; the second *Investigation into Parliamentary and Electorate Travel: Analysis of Administrative Systems and Recommendations for Reform*, was published in December 1998. At a state level, this perception of MPs being self-interested was further reinforced by the decision of Tasmania's 54 state MPs to award themselves a 40 percent pay increase. This provoked considerable community outrage, particularly at a time when the Government was resisting moves to increase salaries for teachers and nurses.

¹¹⁵ Finn, "The Abuse of Public Power in Australia," 5. Nonetheless, in the wake of the Fitzgerald and WA Inc inquiries in particular, there have been renewed calls for more effective accountability measures to be put in place. For example, see J. Warhurst, "Politicians and Citizens: Roles and Responsibilities," Catholic Social Justice Series, Paper No. 27 (Sydney: ACSJC, 1996). The calls included the need for permanent anti-corruption bodies which had the authority to investigate and punish public sector corruption. There has also been a renewed focus on elections, the criminal law, the auditor general, ombudsman, royal commissions and other quasi-judicial inquiries as accountability mechanisms. See, for example, the *WA Inc Report*, Part

Given the high level of awareness that exists, it is therefore not surprising that ethical breaches are widely condemned. This is particularly the case in situations whereby individuals are seen to be in breach - deliberately or unintentionally - of codes of conduct or guidelines for which they themselves were responsible. However public opprobrium can also be expected in situations where those involved could be expected to know that particular behaviour would not be countenanced.

Motives, reasons and justifications

One of the first questions asked when confronted with an apparent ethical breach, such as an allegation of corruption, is 'why the individual acted in a particular way?' That is, we seek to understand the reasons behind the action or decision. Invariably when it comes to the actions of politicians we tend to impute motive.¹¹⁶ According to conventional usage, a 'motive' is:

That which moves or induces a person to act in a certain way; a desire, fear or other emotion, or a consideration of reason, which influences or tends to influence a person's volition; also often applied to a contemplated result or object the desire of which tends to influence volition.¹¹⁷

For its part, 'volition' is defined as "[a]n act of willing or resolving; a decision or choice made after due consideration or deliberation; a resolution or determination."¹¹⁸ According to Peters, the term 'motive' is used in specific contexts in ordinary language.¹¹⁹ Generally the question of

II, and Government of Western Australia, Commission on Government, Report No. 2 (1), December 1995.

¹¹⁶ For a discussion on the imputation of motive generally see C. Wright Mills, "Situational actions and vocabularies of motive," *American Sociological Review* 5, no. 6 (December 1940): 904-13; Alan F. Blum and Peter McHugh, "The social ascription of motives," *American Sociological Review* 36, no. 1 (1971): 98-109; and Robert M. MacIver, "The Imputation of Motives," *The American Journal of Sociology* 46, no. 1 (July 1940): 1-12.

¹¹⁷ *Oxford English Dictionary*, vol. IX, 2d ed., (Oxford: Clarendon Press, 1989), 1132.

¹¹⁸ *ibid*, vol. XIX, 744.

¹¹⁹ R. S. Peters, *The Concept of Motivation*, 2d ed., (London: Routledge and Kegan Paul, 1967), 27.

motive is invoked or raised when the actor's actions signify a departure from what is expected:

The implication is that these actions are not characteristic of him or ones who conform to any standard rule-following purposive pattern. But to ask for a man's motive is very different from asking what made him do it in that it strengthens rather than rules out the suggestion that there was some point in what he did.¹²⁰

Clearly the question of motive is a complex one.¹²¹ We assume that much human action is motivated and we seek to understand that which prompts individuals to act in a particular way. However this is not an easy task. As MacIver argues there is no easy way of 'objectifying'¹²² motives. He argues that you can never 'get at' an individual's motives.¹²³ Although in the case of politics, the opportunity to do so is one of the justifications traditionally offered for the commissioning of an inquiry. He says one of the difficulties in seeking to uncover an individual's motives is that frequently they have a reason for concealing them, that is 'a motive for hiding [their] motives'.¹²⁴ As C. Wright Mills argued, "the differing reasons men give for their actions are not themselves without reasons."¹²⁵ This complexity is highlighted even further by MacIver's distinction between 'motive' and 'parade of motive'.¹²⁶ The latter are the reasons the individual gives for taking a particular course of action, whilst the former are the actual reasons.

Sociologists argue that our behaviour tends to be rule-guided, and this is reflected in our search for and acceptance of motive. Alan Blum and Peter McHugh contend: "...motives are used by members [of society] to link particular concrete activities to generally available social rules".¹²⁷ Not only that, but: "motives are a way for an observer to assign relevance to behaviour in order that it may be recognised as another instance of

¹²⁰ Peters, *Motivation*, 28.

¹²¹ MacIver, "The Imputation of Motives," 5.

¹²² *ibid.*, 4.

¹²³ *ibid.*

¹²⁴ *ibid.*

¹²⁵ Mills, "Situating Actions and Vocabularies of Motive," 904.

¹²⁶ MacIver, "The Imputation of Motives," 8.

¹²⁷ Blum and McHugh, "The Social Ascription of Motives," 98.

normatively ordered action."¹²⁸ This suggests that the task is not necessarily a difficult one. The realisation that it is, however, is clearly encapsulated by MacIver:

When we impute motives we are inferring not simply a relationship between one datum and another; we are inferring a relationship (the causal nexus) between a datum (the overt act) and a postulate that is itself a highly precarious inference (the alleged motive). We should here observe, however, that the postulate is not the existence of motives but the presence of a particular motive within the scheme of a particular situation."¹²⁹

In politics the notion of accountability requires not only that we ask the question 'why' of particular behaviour, but also that the individual under scrutiny is given an opportunity to explain his or her actions, that is to account for one's behaviour. Herein lies the difficulty, however, in accounting for one's behaviour in such a way as will be accepted.

Gresham Sykes and David Matza argue that:

... social rules or norms calling for valued behaviour seldom if ever take the form of categorical imperatives. Rather, values or norms appear as qualified guides for action, limited in their applicability in terms of time, place, persons and social circumstances.¹³⁰

A similar view was expressed by Mills who argued that motives which once were accepted for defined situations are now questioned.¹³¹ In politics this can be extended further to embrace the argument that conduct which may previously have been acceptable has, because of changing community standards or perceptions, become unacceptable. This can make the task of accounting for one's behaviour especially problematic.

In addressing this issue, it is possible to draw from sociological research. Marvin Scott and Stanford Lyman describe an 'account' as "a linguistic device [which is] employed whenever an action is subjected to valiative

¹²⁸ *ibid*, 99.

¹²⁹ MacIver, "The Imputation of Motives," 2.

¹³⁰ Gresham M. Sykes and David Matza, "Techniques of Neutralization: A Theory of Delinquency," *American Sociological Review* 22, no. 6 (1957): 666.

inquiry".¹³² They distinguish between 'accounts' and 'explanations'. An account is defined as:

a statement made by a social actor to explain unanticipated or untoward behaviour - whether that behaviour is his own or that of others, and whether the proximate cause for the statement arises from the actor himself or from someone else. An account is not called for when people engage in routine, common-sense behaviour in a cultural environment that recognises that behaviour as such.¹³³

In politics, however, it may be argued that accounts can be routine and need not relate only to untoward conduct. For example elections are a form of accountability mechanism, the calling of which is not necessarily influenced by considerations of appropriate or inappropriate behaviour.

Explanations, on the other hand, refer to statements about an event which does not involve allegations of untoward behaviour, or have critical implications for a relationship. Lance Bennett points to the need to distinguish between accounts and denials (when the actor denies committing or knowing about the conduct in question), or counter charges (when they question the propriety of the person calling for an account and try and turn the attack back on them).¹³⁴

Scott and Lyman identify two types of accounts: (1) excuses and (2) justifications. They define justifications as accounts in which the individual accepts responsibility for the act, but denies the pejorative or depreciatory labels which have been attached to it:

[T]o justify an act is to assert its positive value in the face of a claim to the contrary. Justifications recognise a general sense in which the act in question is impermissible, but claim that the particular occasion permits or requires the very act.¹³⁵

¹³¹ Mills, "Situated Actions and Vocabularies of Motive," 911.

¹³² Marvin B. Scott and Stanford M. Lyman, "Accounts," *American Sociological Review* 33, no. 1 (1968): 46.

¹³³ *ibid.*

¹³⁴ W. Lance Bennett, "The Paradox of Public Discourse: A Framework for the Analysis of Political Accounts," *The Journal of Politics* 42, no. 2 (1980): 793.

¹³⁵ Scott and Lyman, "Accounts," 51.

Excuses, on the other hand, are accounts in which the individual concedes that the act was wrong, inappropriate or bad, but denies full responsibility for it.¹³⁶ According to Austin, it is easy to confuse the two terms, although he suggests that the differences are readily discernible.¹³⁷ This distinction between justifications and excuses is an important one in the context of the political accountability process, particularly given its highly public nature.

In a political context, accounts have a special significance. This can be linked directly to the conflictual nature of politics and the relationship between performance and political success or failure. This has been identified by a number of writers, including McGraw,¹³⁸ Weaver,¹³⁹ and Bennett.¹⁴⁰ According to Kathleen McGraw, political success or failure can depend upon the ability of the individual to "extricate themselves from various types of predicaments".¹⁴¹ She said that MPs have developed a range of strategies to "moderate, deflect, or eliminate blame for unpopular political decisions".¹⁴² The importance of blame avoidance strategies is highlighted by Bennett:

By accounting for a behaviour, an actor conveys information that directly facilitates or damages the effectiveness of his or her action in the situation. Since politics is, by definition, a game of conflict, political success or failure depends on the effectiveness of responses to challenges. Accounts are the standard means of responding to challenges when avoidance, denial, or the use of brute force are not options. Accounts not only shape opponents' and spectators' possible responses to specific situations, but they can reflect on the credibility or leadership status of an actor or a group in future situations.¹⁴³

¹³⁶ *ibid.*, 47. See also D. Thompson, "Moral Responsibility of Public Officials: The Problem of Many Hands," *American Political Science Review* 74, no. 2 (1980): 905-16.

¹³⁷ J. L. Austin, "A Plea for Excuses," *Philosophical Papers* (Oxford: Clarendon Press, 1961), 124.

¹³⁸ Kathleen McGraw, "Avoiding Blame: An Experimental Investigation of Political Excuses and Justifications," *British Journal of Political Science* 20 (1990): 119-42.

¹³⁹ R. Kent Weaver, "The Politics of Blame Avoidance," *Journal of Public Policy* 6 (1986): 371-98.

¹⁴⁰ Bennett, "The Paradox of Public Discourse."

¹⁴¹ McGraw, "Avoiding Blame," 119.

¹⁴² *ibid.*

¹⁴³ Bennett, "The Paradox of Public Discourse," 793.

Bennett identifies a second characteristic which separates accounts from other forms of political explanation. He says that they are often the 'key variables' in a conflict situation and offer a normative basis on which the propriety or legitimacy of the conduct in question may be judged. Perhaps more significantly, however, he also suggests that political accounts, if effective, can:

[C]onstrain important political variables such as the appropriate roles that can be played out by opponents or spectators, the political responses compatible with those roles, and the institutional contexts in which subsequent political action may develop.¹⁴⁴

According to Bennett, political accounts provide cues which help us to interpret and respond to a given situation. Whether we are able to do so, depends on a number of factors, including the availability of information. He argues that actors who are able to manage documentary information are generally able to control a political situation. It is difficult to test or falsify accounts if there is little evidence available to refute the actor's claims. This, he suggests, leaves the political opponent in the position whereby he or she has to base his or her arguments on a debate about motives. However this poses problems when there is little evidence to back up the allegations. He argues: "In the absence of evidence to the contrary, such an account leaves opponents in the weak position of having to restate unsupportable charges or having to abandon them altogether."¹⁴⁵

Whilst Bennett argues that an effective account can defuse a political crisis, the situation can quickly assume a different complexion:

Each new act marks a potential shift in the definition of a situation and sets the terms to which other actors must respond if their own preferences about the course of the situation are to be taken seriously.¹⁴⁶

¹⁴⁴ *ibid*, 794.

¹⁴⁵ *ibid*, 802.

¹⁴⁶ *ibid*, 808-09.

McGraw introduces another variable into the equation - timing. She argues that there may well be a link between the timing of accounts and their effectiveness:

Because negative impressions are notoriously difficult to change, an effective account should have its optimal impact if offered immediately after a politician's link to an unpopular policy is made public, before the public's negative impression has a chance to solidify or crystallise. The effectiveness of 'good' accounts should *decrease* as the temporal distance between the policy decision and account offering *increases*. On the other hand, an immediate poor account can only serve to exacerbate public disapproval, and indeed, can only have negative repercussions whenever it is offered.¹⁴⁷

McGraw's comments correspond with the views of some media researchers and crisis management theorists. In crisis management, for example, it is widely acknowledged that there exists a 'window of opportunity' during which time individuals or organisations should seek to publicise their views.¹⁴⁸ If they miss that window, the likelihood is that their opponents will have captured the media's (and hence public's) attention and thus influence their attitudes towards the particular crisis. According to Samuel Dyer and others, this can mean them losing control of the issue.¹⁴⁹ However it should also be acknowledged that in seeking to manage a crisis, a political actor may have a number of different audiences to which he or she could respond.¹⁵⁰ This is the view of Bennett, who argues that the same account may not be effective in the case of all audiences; some may be accepting of an account, whilst others will be sceptical.¹⁵¹ For example, one's political opponents could be expected to be more sceptical and less likely to accept an account than one's political colleagues. The reason for this links directly to their respective political fortunes. Given that politics is a zero sum game, the former group would stand to gain and the latter group lose if the leader is found wanting.

¹⁴⁷ McGraw, "Avoiding Blame," 130-31.

¹⁴⁸ Samuel Coad Dyer, "Windows of Opportunity: The Media in Crisis Mode," *Australian Journalism Review* 17, no. 2 (1995): 60-67; Samuel Coad Dyer, "A News Flow Analysis of the Sale of a Public Asset," *Australian Journal of Political Science* 29, no. 1 (1994): 172-78.

¹⁴⁹ Dyer, "Windows of Opportunity," 61.

¹⁵⁰ Bennett, "The Paradox of Discourse," 816.

¹⁵¹ *ibid.*

Invoking a situational morality

One of the difficulties confronting individuals who seek to justify their actions is that they often seek to invoke a 'situational morality'.¹⁵² Citing Scott and Lyman, Chibnall and Saunders argue that behaviour which is normalised within a particular institutional sphere, for example politics, may not be acceptable to another group or even within the broader community.¹⁵³ This in line with Johnston's insider/outsider approach discussed previously. Chibnall and Saunders attribute this disparity to a conflict between what Berger and Luckmann term 'sub-universes of meaning' on the one hand, and the 'core universe of meaning' on the other.¹⁵⁴ Sub universes of meaning are described as 'alternative classificatory procedures' for defining behaviour which:

[R]eflect the values, experiences and practical purposes of the collectivity, providing a framework of meaning within which the routine activities of members can be made sense of, and supplying informal rules of legitimacy for these activities. Whilst they may not constitute a fully coherent system, or be similarly understood by all members, they nevertheless form the basis of reality-construction within the group.¹⁵⁵

According to Chibnall and Saunders, these sub universes of meaning are "generated in such a way as to facilitate the favourable categorisation of members' every day activities".¹⁵⁶ Core universes of meaning on the other hand are externally generated classificatory procedures. That is, they apply within the wider community, rather than within a particular institutional context. Whilst the sub-universes of meaning tend to be flexible so that they can be adapted to changing circumstances, the core universes of meaning are more rigid and less susceptible to manipulation. According to Chibnall and Saunders, the behavioural

¹⁵² Chibnall and Saunders, "Worlds Apart: Notes on the Social Reality of Corruption," 138-54.

¹⁵³ Scott and Lyman, "Accounts." Cited in Chibnall and Saunders, "World's Apart," 141.

¹⁵⁴ P. Berger and T. Luckmann, *The Social Construction of Reality* (Harmondsworth: Penguin, 1967). Cited in Chibnall and Saunders, "Worlds Apart," 138.

¹⁵⁵ *ibid.*, 139.

¹⁵⁶ *ibid.*

codes of the core universes of meaning are generally supported by law.

Consequently:

While members of a social group may routinely operate with their own set of largely unexplicated rules and interpretative criteria, they are forced to address themselves to the categorical code of law when formally called upon to account for problematic behaviour. That is, in the course of every day interaction within the group, a member may adopt a situational morality in accord with his practical purposes at hand, defining his situation with reference to informal interpretative criteria current within the group. While aware of possible alternative definitions deriving from the legal code, he may choose to ignore them.¹⁵⁷

This means that whilst an individual may be able to account for behaviour within a particular institutional group, that same explanation may not necessarily be accepted if offered within the wider community. In politics this can take on a particular significance, however. Take "jobs-for-the-boys", for example. In Australia this practice has been embraced by all sides of politics who have been in the position to distribute such largesse. However the attitude of MPs towards such a practice can be influenced by whether it is in government or opposition. Political parties that have been known to denounce jobs-for-the-boys whilst in opposition, have made such appointments after winning government. When such behaviour is exposed, they regularly seek recourse to a situational morality.

According to Chibnall and Saunders, individuals can use a number of strategies when seeking to account for behaviour. They can: (1) seek to invoke a situational morality by claiming that such transactions, decisions or actions were not uncommon within the circle in which they worked, and therefore because everyone did it, it cannot be wrong; (2) argue that there was no intention to break the law, only to bend the rules, and that it was not appropriate to punish them when the system encouraged such behaviour; (3) seek to legitimate the behaviour in the context of its consequences. That is, nobody was hurt; and nobody had

¹⁵⁷ *ibid*, 141.

been forced to do anything against their will.¹⁵⁸ As Chibnall and Saunders point out:

The classification of an act as justifiable on the basis of either results or conformity does not necessarily mean that the classifier can no longer see the act as illegal, but it does effectively remove the negative moral connotations which usually accompany the definition of an act as illegal.¹⁵⁹

Chibnall and Saunders argue that the use of a situational morality enables the group member to use interpretative criteria which he or she knows is likely to be accepted within the group, to define behaviour which would be readily classified as deviant or unacceptable by outsiders. Not only that, but the actor's choice of definition: "is likely to be highly dependent on both his practical purposes at the time, and his assumptions about the social world and his place in it".¹⁶⁰ The problems arise, however, when they are required to justify their behaviour in the wider community:

The transition from the world of everyday life to the courtroom situation involves the displacement of common-sense categories and informal classificatory procedures by legal categories and formal procedures. Previously justifiable behaviour is threatened with re-definition as different interpretative criteria become salient. In such a situation, common-sense justifications are transformed into excuses as the primacy of situational morality is usurped. They are thus reduced to the status of statements of mitigating circumstances which can only expect to reduce the negative consequences of classification without affecting the classification itself.¹⁶¹

The problems are especially evident in the case of corruption. According to Chibnall and Saunders, "... corruption law is intrinsically more ambiguous than most, referring as it does as much to motives as to actions, and intentions as much as consequences".¹⁶² This makes the task of the individual who is seeking to justify a particular action particularly difficult. The problem stems from the fact that:

¹⁵⁸ Chibnall and Saunders, "World's Apart," 143.

¹⁵⁹ *ibid.*, 144.

¹⁶⁰ *ibid.*

¹⁶¹ *ibid.*, 145.

¹⁶² *ibid.*, 149.

[I]n the case of the legal category of corruption, the criteria judged to be relevant to the classification of behaviour may vary between, on the one hand, those who engage in the behaviour in question, and on the other, those whose task it is to make public judgment upon it.¹⁶³

From an accountability perspective, Chibnall and Saunders raise an important issue when they argue that individuals are probably aware of the core universe of meaning attached to the term 'corrupt conduct' or 'corruption', and the fact that it could conceivably conflict with the alternative universe of meaning they employed in classifying the behaviour within their own group. However the classificatory scheme which reflects the core universe of meaning can be ignored if it is "judge[d] to be of hindrance to them in the pursuit of their desired activities".¹⁶⁴ The thrust of the argument is that accounts which take the form of justifications within a situational morality assume the posture of excuses when subjected to the scrutiny of an environment in which a core universe of meaning prevails.

Conclusion

As the discussion in the first part of this chapter revealed, it is unlikely that there will ever be agreement over what does or does not constitute political corruption. This was highlighted by the work of Heidenheimer and the results of studies undertaken by Peters and Welch, Atkinson and Mancuso, Johnston, Gardiner, Jackson et al, Jackson and Smith, and the ICAC. As the various studies discussed reveal, 'legality' is not the only criterion employed when conduct is labelled; often individuals will employ a range of personal criteria when labelling conduct. Consequently, there is the potential for disagreement, with scope for formal-legal standards to be out of touch with community attitudes and similarly, there is the prospect that different sections of the community will respond in different ways to the same behaviour. Nonetheless, the evidence to emerge from the

¹⁶³ *ibid.*, 150.

¹⁶⁴ *ibid.*

studies does support Peters and Welch's finding that attitudes can be influenced by the personalities involved (both donor and beneficiary), the favour provided and the pay-off received.

The debate over the labelling of conduct is part of a much broader issue which involves the belief that elected officials are ultimately accountable to the people who entrusted them with public office. This is the fiduciary principle, as explained by Finn and Clark, and is fundamental to democratic thinking. The importance of this view was expounded by Harman and Crable, who argued that elected public figures are obliged to account for one's actions when called upon to do so. However despite this obligation, the discussion in this chapter showed that there can be difficulties in holding public figures to account, with a number of reasons being identified. Firstly, there can be differing and contradictory expectations (both public and political) about role responsibilities which attach to particular office holders. This was identified by a number of writers, including Finn, Zimmerman, and Vogelsang-Coombs and Bakken. One of the reasons offered for the existence of differing expectations was the discretion which attaches to public office. It was argued that not only do different offices carry with them different expectations, but that these expectations can be linked to an individual's role set. This was illustrated in figure 2.3. It was further argued, however, that these relationships can lead to role strain and/or role conflict. Secondly, accountability involves both legal and political mechanisms. Each can operate according to different standards, the former tending towards objective standards, the latter often involving subjective factors. Whilst overlap is possible, the fact that political accountability can be determined by subjective factors increases the prospect of disagreement when the labelling of conduct occurs.

The chapter then addressed the difficulties experienced by individuals accused of behaving corruptly. One of the reasons identified for this was the tendency to focus on the motives of the individual. As Peters argues, there is a tendency to focus on motives when behaviour

departs from what is expected. In this case, it was possible to draw from the work of MacIver, Mills, Blum and McHugh to show how difficult it is to identify the motives for the conduct in question.

Despite the obvious difficulties involved in identifying motives, it was argued that accounts as justifications are important in the political process. Not only do they help to inform voters, but also they can undermine the political fortunes of those whose conduct is under scrutiny. Drawing from the work of Bennett, McGraw and Dyer, the chapter argued that if the accounts are not carefully crafted, timed and directed, the political consequences can be considerable. Instead of 'putting a lid' on an issue, poor accounts can cause the issue to spin out of control. This is especially so in politics where one's political opponents will invariably seek to exploit another's misfortune if they can foresee a political benefit for themselves.

Finally, this chapter has argued that the success or failure of an attempted justification may depend upon the arena in which it is being used. According to Chibnall and Saunders, a situational morality may not be accepted outside of one's peer or professional group. Whilst it is possible to rationalise particular conduct in one setting (such as Parliament), within the broader community such justifications are often not accepted because a different set of standards is applied.

Chapter 3

Media and Accountability

Introduction

In liberal democracies the media has traditionally been ascribed an important role as an accountability mechanism.¹ This role extends beyond its coverage of day to day politics to include such anti-democratic practices as corruption.² To understand why the media has such an interest in the coverage of corruption and why it is highly regarded as an anti-corruption mechanism, it is necessary to understand both its unique role in society and also its relationship with politicians. It is also important to understand how the media operates and what criteria are used to determine which events and issues will be translated into 'news' stories.

The chapter begins by looking at the origins of the media's accountability or 'watch dog' role as a response to concerns about the misuse of political

¹ See, for example, John Western, "The Role of the Media in Politics," *Current Affairs Bulletin* 63, no. 9 (1987): 14-23; Julianne Schultz, *Reviving the Fourth Estate: Democracy, Accountability and the Media* (Cambridge: Cambridge University Press, 1998); Stephen Koss, *The Rise and Fall of the Political Press in Britain* (London: Fontana, 1990).

² Despite the perception that the media plays such a role, there does not appear to have been much coverage of the media's role as an anti corruption mechanism. Academic writers who have looked at this issue include Gladys Engel Lang and Kurt Lang, *The Battle for Public Opinion: The President, the Press, and the Polls During Watergate* (New York: Columbia University Press, 1983). Part of that work has since been reproduced as "The Media and Watergate," in Doris A. Graber, ed. *Media Power in Politics* 2d ed (Washington: CQ Press, 1990), 255-62. Other pieces include Alan Doig, "You publish at your peril: Restraints on Investigatory Journalism," in M. Clarke, ed., *Corruption: Causes, Consequences and Control* (New York: St Martin's Press, 1983); D. Murphy, "Journalistic Investigation of Corruption," in Clarke, *Corruption: Causes, Consequences and Control*, 58-73; A. Szasz, "The Process and Significance of Political Scandals;" B. Grundy, "Who sets the news agenda: The Turkeys or the Chooks?" in Scott Prasser, Rae Wear and John Nethercote, eds., *Corruption and Reform: The Fitzgerald Vision* (Brisbane: UQP, 1990), 27-36; Evan Whitton, "The Role of the Media," in Prasser, Wear and Nethercote, *The Fitzgerald Vision*, 37-44; Chris Masters, "Tackling Corruption – Some Strategies," in Prasser, Wear and Nethercote, *The Fitzgerald Vision*, 45-48; and Phil Dickie, "The Media – A Lot to Answer For," in Prasser, Wear and Nethercote, *The Fitzgerald Vision*, 49-57. See also M. Simons, "Inside the Press Gang," *Eureka Street* 1, no. 1 (March 1991): 6-9; C. Masters, "Corruption and Reporting Corruption in Australia," *Canberra Bulletin of Public Administration* 68 (March 1992): 15-19; P. Dickie, "The Media's Role in the Criminal Justice System," *Social Alternatives* 11, no. 3 (1992): 26-28.

power. It then discusses its role as a conduit between politicians and the wider public and the responsibilities which attach to that function. As the chapter will show, there has been considerable debate regarding the ability of the media to fulfil its obligations as an accountability mechanism. In part this debate focuses on the ability or even the desire of media organisations to balance their public service responsibilities with their profit-making goals. In defence of the media it will be argued that a number of constraints work against it performing an effective accountability (and, thus, an anti-corruption) role. These include the relationship between journalists and sources, the complexity of corruption as an issue, institutional constraints such as deadlines, and legal factors such as Australia's libel and defamation laws. Despite these constraints, it will be argued that the media is widely recognised as having an important anti-corruption role.

The chapter will also explain why corruption stories are likely to satisfy Murray Masterton's newsworthiness model and thus tend to be covered by the media. It will argue that even though corruption satisfies Masterton's test, it is difficult to contend that the media covers such stories only from an accountability perspective. In fact it will be argued that Masterton's criteria of newsworthiness can apply equally to information as 'news' and to information as 'entertainment', a conclusion endorsed by some anti-corruption fighters who have mixed views about the role of the media.

An accountability role

The debate over the accountability role of the media in liberal democracies is not a new one. Its origins can be traced back at least to the late 18th and early 19th centuries when there was a strong push for freedom of the press in the UK and the US.³ In part this debate grew out of concerns over the misuse of political power, and in particular the democratic right of the

public to know what the government of the day was doing. These concerns were encapsulated in Lord Acton's widely quoted dictum: "power tends to corrupt and absolute power corrupts absolutely."⁴ One early supporter of a free press was Jeremy Bentham, who argued that Governments are always ruled by considerations of self interest:

Such is the nature of man when clothed with power ... that ... whatever mischief has not yet been actually done by him today, he is sure to be meditating today, and unless restrained by the fear of what the public may think and do, it may actually be done by him tomorrow.⁵

Bentham believed that a press free of government controls could provide one of the main constraints against despotic power. It was sentiments such as these which saw the media hailed and even promote itself as the 'fourth estate'⁶. This involved essentially a watchdog function, built upon a responsibility to independently monitor public affairs and to inform citizens so they can realise the "democratic ideal",⁷ that is to participate in the political process. However a number of writers have questioned whether the media fulfils such functions. Julianne Schultz, for example, has argued:

The grand functions of the media, once the subjects of monumental political struggles, have been debased by overstatement and undermined by the very pervasiveness which makes the media so central to our lives at the end of the 20th century. ... The gap between the rhetorical claims about the role of the media and the reality is huge.⁸

³ In the US, this principle was encapsulated in the First Amendment to the Constitution which was passed on December 15, 1791. See John Keane, *The Media and Democracy* (Cambridge: Polity Press, 1991), 4. See also Koss, *The Rise and Fall of the Political Press*.

⁴ *Life and Letters of Mandell Creighton*, vol. 1, 5th impression (London: Longmans, 1905), 372; Andrew Heywood, *Political Ideas and Concepts: An Introduction* (London: Macmillan, 1994), 20.

⁵ Jeremy Bentham, *On the Liberty of the Press and Public Discussion* (London, 1820-21), 15. Quoted in Keane, *The Media and Democracy*, 15.

⁶ According to Koss, (page 2) this term was popularized by T. B. Macaulay, although it has been attributed to others, including William Hazlitt. See Colin Sparks, "The Popular Press and Political Democracy," *Media, Culture and Society* 10 (1988): 209-23.

⁷ Herbert J. Gans, "News Media, News Policy and Democracy: Research for the Future," *Journal of Communication* 33, no. 3 (Summer 1983): 183.

⁸ J. Schultz, ed., *Not Just Another Business: Journalists, Citizens and the Media* (Leichardt: Pluto Press, 1994), 15. Koss, writing about the 19th century British press, said that in adopting

Media as a conduit

For the majority of people, the media provides them with a window to the world outside of their immediate purview. That is, they rely on the media to keep them informed about what is happening and where; who is doing what and why. By fulfilling that role, the media can be considered the link - a conduit - between the politician and their constituents.⁹ As such the media has been variously described as a "feedback mechanism",¹⁰ and as "the central political arena of contemporary liberal democracies".¹¹ Without the media, the overwhelming proportion of people would be ignorant, not only of political happenings, but of other events outside of their immediate existence. Likewise, without the media politicians may be oblivious of the views of constituents or interest groups within a community. As White argues, representative democracies require that political communication occur in both directions between government and the people.¹² He contends:

If the people are generally ignorant of the really basic facts - no matter how these are defined - then their input and judgment on political and governmental affairs cannot carry weight.¹³

and promoting such a view of its role the press had "creat[ed] a myth that has outlasted the purposes for which it was initially intended" (see page 2). This view is reinforced by Rod Tiffen, who argues that "[n]ewspapers were organs of politics before they were organs of news." See R. Tiffen, "The Media and Democracy: Reclaiming an Intellectual Agenda," in Schultz, *Not Just Another Business*, 59. That is, despite the democratic claims upon which the watchdog role was originally founded, the early press was overtly partisan and would unashamedly and vigorously participate in party-political debates. It should be noted that Australia has not had the tradition of a partisan press in the sense that the US has. Whilst Australian media organisations have supported one political party over another at election time, that support has tended to be transient, with the allegiances changing over time. For an excellent analysis of the media as the fourth estate, see J. Schultz, *Reviving the Fourth Estate: Democracy, Accountability and the Media* (Cambridge: CUP, 1998).

⁹ The role of the media as a conduit is discussed in detail by Joshua Meyrowitz, "Images of Media: Hidden Ferment - and Harmony - in the Field," *Journal of Communication* 43, no. 3 (Summer 1993): 55-66.

¹⁰ See for example, J. Schultz, "Media Convergence and the Fourth Estate," in *Not Just Another Business*, 17.

¹¹ R. Tiffen, "The Media and Democracy" in Schultz, *Not Just Another Business*, 57.

¹² D. M. White, "Political Communication and Democratic Government," *Politics* 24, no. 1 (May 1989): 29.

¹³ *ibid*, 31.

The role ascribed to the media carries with it enormous obligations, both to the ultimate recipients of the news and to those who are the subjects of media coverage. The media is expected to be responsible, objective and fair when covering or reporting on news events.¹⁴ This is not an easy task, because it often involves competing responsibilities. On the one hand the media has to weigh its obligation to inform people about events, so they can form their views about issues and, if necessary, act. That is the media's public interest function. But on the other hand, the media has an obligation to those people who are being reported upon. This involves not only respecting their rights as citizens¹⁵, but also acknowledging the obligations which attach to them as the holders of a particular public office.

In recent years the ability of the media to fulfil these responsibilities has been widely questioned. There are a number of reasons for this, including concern over: (1) the increasing concentration of media ownership; (2) editorial independence; and (3) the increased role of entertainment as a factor in the news equation. All three have been widely debated in an Australian context, with considerable focus on the fact that the metropolitan and national print media market is dominated by just two companies – News Ltd and Fairfax.¹⁶ The dramatic decline in the number of media proprietors and metropolitan daily newspapers during the 20th century has led to a widely held concern that a small number of

¹⁴ Whether the media can in fact achieve these goals is itself the subject of an on-going debate. A number of academics and journalists have questioned whether journalists can be objective when covering stories. See for example W. Lance Bennett in *News: The Politics of Illusion*, 2d ed (New York, Longman, 1988). Also, J. O'Neill "Journalism in the Market Place," in Andrew Belsey and Ruth Chadwick, eds, *Ethical Issues in Journalism and the Media* (London: Routledge, 1992).

¹⁵ There has been considerable debate in recent years about whether public figures have rights as individuals which can be distinguished from their public roles. See, for example, Dennis F. Thompson, "The Private Lives of Public Officials," in Joel L. Fleishman, Lance Leibman and Mark H. Moore, *Public Duties: The Moral Obligations of Government Officials* (Cambridge, Mass: Harvard University Press, 1981).

¹⁶ In 1991 News Ltd controlled 62.8 percent of circulation in this market (Monday to Sunday), with Fairfax claiming 20.4 percent. See House of Representatives Committee on the Print Media, *News and Fair Facts: The Australian Print Media Industry* (Canberra, AGPS, March 1992), 102-3.

companies control the information people receive via the media.¹⁷ For example, the House of Representatives Select Committee on the Media concluded that "concentration of ownership is potentially harmful to plurality of opinion and increases the potential risk that news may be distorted".¹⁸ Of particular concern was the fear that "owners may bias reporting or suppress views which could conflict with their wider commercial interests."¹⁹

Public service or profit?

This highlights one of the more difficult problems confronting privately owned media organisations – the need to balance their public service responsibility with their commercial imperatives. The dilemma is summed up by Liebling who argues: "[t]he function of the press in society is to inform, but its role is to make money."²⁰ However, according to Hamilton, the question of whether the private interest of media owners can, or should, be reconciled with the 'public interest' is not an issue:

A newspaper is a private enterprise owing nothing whatever to the public, which grants it no franchise. It is therefore affected with no public interest. It is emphatically the property of the owner, who is selling a manufactured product at his own risk.²¹

¹⁷ For example, in 1903 there were 21 capital city dailies owned by 17 proprietors; in 1923 there were 26 newspapers controlled by 21 companies. By 1950 there were 15 daily newspapers and 10 proprietors. In 1960 there were 14 newspapers owned by 7 proprietors and in 1972 four companies controlled 16 dailies. These figures are taken from J. Henningham, "The Press," in Stuart Cunningham and Graeme Turner, eds., *The Media in Australia: Industries, Texts and Audiences* (Sydney: Allen and Unwin, 1993), 59-71; and H. Mayer, "Press Oligopoly," in H. Mayer and H. Nelson, eds., *Australian Politics: A Third Reader* (Melbourne: Cheshire, 1973), 642-53. Increasing community concern during the 1980s about media influence led the then federal government to introduce new cross media ownership rules. These rules, introduced in 1987, were designed to prevent companies from controlling the electronic media and the print media in the same market.

¹⁸ *News and Fair Facts*, xxi.

¹⁹ *ibid*, xxvii. Certainly it appears unlikely that new publications will be established to compete in the Australian metropolitan or national daily market, given the prohibitive barriers to entry that exist. These include: (1) start-up costs; (2) the need to overcome existing loyalties of readers and advertisers to existing publications and (3) the economies of scale, including the relationship between circulation and production/distribution costs. See *News and Fair Facts*, 110.

²⁰ A. J. Liebling, cited by R. Tiffen, "The Media and Democracy," in Schultz, *Not Just Another Business*, 61

²¹ *ibid*.

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²⁰ A. J. Liebling, cited by R. Tiffen, "The Media and Democracy," in Schultz, *Not Just Another Business*, 61

²¹ *ibid.*

Yet Hamilton's view is not universally shared. The noted US publisher Joseph Pulitzer warned in 1904:

Once let the publisher come to regard the press as exclusively a commercial business and there is an end of its moral power ... [w]ithout high ethical ideals, a newspaper is not only stripped of its splendid possibilities for public service, but may become a positive danger to the community.²²

These views were subsequently reiterated by the owner and editor of the Manchester Guardian, C. P. Scott. In an oft-quoted assessment of the media's dual responsibilities, Scott said:

A newspaper has two sides to it. It is a business, like any other, and has to pay in the material sense in order to live. But it is much more than a business; it is an institution; it reflects and influences the life of a whole community; it may affect even wider destinies. It is, in its way, an instrument of government. It plays on the minds and consciences of men. It may educate, stimulate, assist, or it may do the opposite. It has, therefore, a moral as well as a material existence, and its character and influence are in the main determined by the balance of these two forces. It may make profit or power its first object, or it may conceive itself as fulfilling a higher and more exacting function.²³

In Australia, it appears that the public responsibility/commercial imperative dichotomy has come out in favour of profitability. According to Ward, Australia's media organisations are primarily commercial businesses which exist to make a profit. The carrying of news, he points out, is their "lesser role".²⁴ This view is reinforced in part by Henry Mayer, who argued that profitability was a means to an end. He said that unless a media organisation was profitable it would not be able to perform its public duties, such as informing, educating and enlightening its readers, listeners and viewers and sometimes advocating social and political

²² Cited in P. Chadwick, "Creating Codes: Journalism Self Regulation," in Schultz, *Not Just Another Business*, 169.

²³ Cited in Chadwick, "Creating Codes," in Schultz, *Not Just Another Business*, 169.

²⁴ I. Ward, *Politics of the Media* (Melbourne: Macmillan, 1995), 1. This view is also expressed by Douglas Gomery in "The Centrality of Media Economics," *Journal of Communication* 43, no.3 (Summer 1993) 190.

change.²⁵ The success of the organisation, Mayer argued, may depend on how well it is able to reconcile the profit making and public service objectives.²⁶ However this is not an easy task. According to O'Neill, there is an inherent tension between the "goals of journalism" which he describes as "truth telling about significant and contemporary events"²⁷ and the market context in which the media operates.²⁸ To survive within the marketplace, O'Neill says that the media has to satisfy both their audience and their advertisers and this influences the final product.²⁹

There is a related concern as well, which has to do with the independence of journalists (and editorial staff, including editors) from interference by media proprietors and non-editorial management. Proprietorial power can manifest itself in various ways, including through the appointment of the editor and other senior staff, and through attempts to influence what stories are covered and how.³⁰ This approach is not always greeted enthusiastically by journalists who express concern that traditional journalistic goals risk being subsumed by commercial considerations.

The third issue raised – the increasing focus of media organisations on entertainment – is not unrelated. When they were first introduced, radio and television were primarily sources of entertainment. However technological developments and changing lifestyle patterns enabled the electronic media, particularly television, to make inroads into areas long considered the domain of newspapers, including the provision of news. The result of this is a product which combines both information and

²⁵ H. Mayer, cited in J. Hurst, "Journalistic Objectivity and Subjectivity," *Australian Journalism Review* 13, no. 1 (1991): 25. See also R. Tiffen, ed., *Mayer on the Media: Issues and Arguments* (St Leonards: Allen and Unwin, 1994).

²⁶ *ibid.*

²⁷ John O'Neill, "Journalism in the Marketplace," in Belsey and Chadwick, *Ethical Issues in Journalism and the Media*, 19.

²⁸ *ibid.*, 15.

²⁹ The importance of advertisers to mass circulation daily newspapers cannot be under-estimated. News Ltd, for example, has estimated that advertisers contribute approximately 70 percent of total revenue, compared with 30 percent from circulation. The implication from this is that media organisations would be loathe to offend their major advertisers. See *News and Fair Facts Report*, 54.

³⁰ M. Grattan, "Headline/Deadline/Bottom Line: The Case for Good Journalism," Walter Murdoch Memorial Lecture, Perth, September 13, 1995, 11.

entertainment and has been labelled 'infotainment'. Its influence can be seen in all news media, including newspapers. This also appears to have affected the amount of space allocated to coverage of hard news, with research showing that the amount of space allocated to hard news in newspapers has declined in recent years.³¹

Another casualty of this trend appears to be the way in which news stories are presented. Whereas traditionally newspapers have tended to distinguish between news and views, in more recent times the boundaries between the two have become hazy, with so-called news articles now containing interpretation and commentary along with the 'facts'. Bemoaning this trend, former NSW Premier Nick Greiner has claimed: "News and opinion have become hopelessly mixed and many inexperienced and inexperienced reporters parade their views or prejudices in their news reports."³² Greiner attributed this in part to the journalistic culture, a view shared by journalist and commentator Margaret Simons. According to Simons, under the culture which pervades Australian newsrooms, new journalists:

[a]bsorb attitudes to their work by exposure to the more experienced and often more cynical people working around them. The old methods become the new, with little opportunity or encouragement for fresh ideas to penetrate.³³

A tarnished image

This criticism is also reflected in the results of opinion polls which suggest that the public's regard for journalists is no higher than its attitude towards the politicians we expect them to hold accountable. The

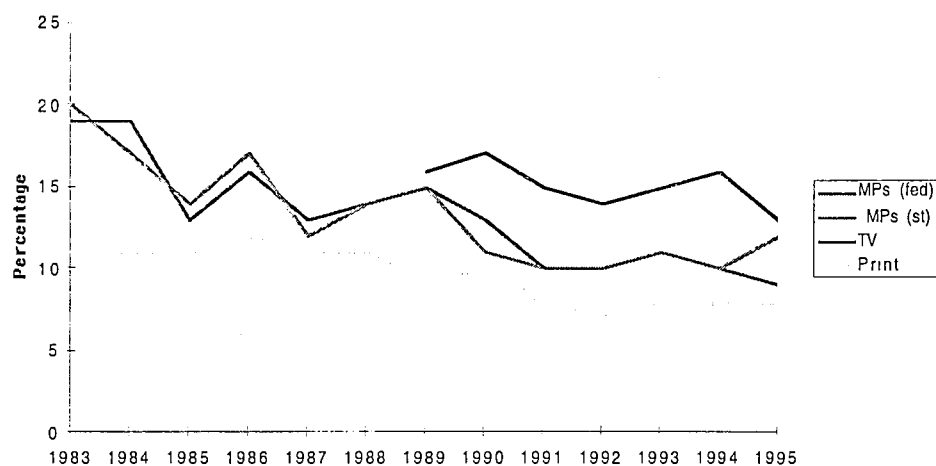
³¹ This appears to have been confirmed by a number of Queensland studies. See for example, G. Turner, "Information underload: recent trends in the *Courier-Mail's* Information news Content," *Australian Studies in Journalism* 1 (1992): 43-72; Susan Forde, "Silent Fall-out: the effects of Monopoly and Competition on Information Diversity," *Australian Studies in Journalism* 3 (1994): 290-314.

³² N. Greiner, "The smart-alec culture: a critique of Australian journalism," *Australian Studies in Journalism* 2 (1993): 3-10. See also the rejoinder by Matthew Moore, "More to blame than the media," *AQ* 65, no. 2 (1993): 97-104.

³³ Simons, "Inside the Press Gang," 6.

comparative standing of journalists and MPs is detailed in Chart 3.1 (below). The poll, which was conducted on behalf of the *Bulletin* by the Morgan Research Centre, shows that newspaper journalists received an ethics and honesty ranking of just 8 percent, below both state and federal MPs, and above only that of car salespeople (3%).³⁴ Television reporters fared marginally better (13%), placing them one rung above State MPs in the ethics and honesty race, although their rating had fallen from 16% in just 12 months, a solid indication of viewer dissatisfaction.³⁵

Chart 3.1: Honesty and ethics of MPs and journalists compared



Adapted from *Bulletin* Poll

A separate poll from mid 1996 revealed more specific attitudes toward the media.³⁶ According to the survey, 85 percent of Australians regard the media as too sensational, 80 percent believe it is uncaring when dealing with issues like privacy and grief and 72 percent consider the media too inaccurate and likely to provide misleading information.³⁷ More than 50 percent believed that the media is too critical of people and institutions

³⁴ Roy Morgan Research Centre, Finding No. 2749, published in the *Bulletin*, May 9, 1995. The 1996 survey cited in chapter two shows that in the next 12 months, the ethical ratings of both television and print journalists fell a further one percent (to 12% and 7% respectively), whilst the ratings of federal MPs increased 4% to 13% and State MPs remained stable (12%).

³⁵ *ibid.*

³⁶ D. Murphy, "Facts and Friction," *Bulletin*, May 28, 1996, 14-17.

which were trying to serve Australia, with 53 percent agreeing that the media provided too little focus on subjects most Australians cared about.³⁸ When asked about the performance of journalists and media commentators, the respondents were particularly scathing. Only 16 percent believed they behaved in a trustworthy manner when obtaining and presenting stories,³⁹ while only 19 percent felt they prepared reports which were fair, accurate and free of bias.⁴⁰ Just 13 per cent were prepared to adjudge as good their willingness to accept criticism and to acknowledge or correct mistakes.⁴¹

Not surprisingly, a former editor of the *Melbourne Age*, Michael Smith, defended his profession against such findings, saying he would be more concerned if journalists were rated at the top of "those rather silly surveys".⁴² He said:

We are meant to upset people, we are meant to make people angry, we are meant to disturb people if we want to fulfil our true role of activating community opinion toward thinking about improvements to our society. We are not meant to be popular. We are meant, to steal an old line, to afflict the comfortable, and to comfort the afflicted.⁴³

However Smith did admit to being concerned at the "persistence and strength of the anti-media feeling of the past year or two".⁴⁴ And while he argued that the standard of journalism was better now than a generation ago, readers and viewers were also more educated, more critical and more likely to challenge the media about its mistakes.⁴⁵ "The public is demanding higher standards of competence – and ethics – in the media,

³⁷ *ibid.*, 16.

³⁸ *ibid.*

³⁹ *ibid.*, 17. The responses were: 44% fair; 36% poor; 4% can't say.

⁴⁰ *ibid.* The responses were: 40% fair; 29% poor; 2% don't know.

⁴¹ *ibid.*

⁴² M. Smith, "Accountability, the writing on the wall," *Australian Journalism Review* 14, no. 1 (Jan-June 1992): 28.

⁴³ *ibid.*

⁴⁴ *ibid.*

⁴⁵ *ibid.*

the same as it is demanding higher moral standards of all the other institutions," he said.⁴⁶

Criticisms and warnings aside, Australians are still heavy consumers of the media. According to the *News and Fair Facts* report, 90 percent of males and 86 percent of females aged 14 and over read at least one newspaper per week in 1991.⁴⁷ This is despite evidence which shows that newspaper readership and circulation have declined since the 1950s. According to John Henningham, between 1950 and 1990 newspaper readership in Australia fell from 700 per 1000 to less than 300.⁴⁸ A more recent survey found that between 1951 and 1994 per capita newspaper circulation fell from 2.45 to 1.24.⁴⁹ Between 1991 and 1993 alone circulation fell 5.6 percent.⁵⁰

A powerful media?

Despite the low regard in which the media is held and evidence that newspaper circulation in Australia is declining, it is widely believed that the media has the ability to influence the way people think about issues.⁵¹

⁴⁶ *ibid.*

⁴⁷ Daily newspapers reach 68 percent of males and 61 percent of females, with Sunday papers reaching 55 percent and 52 percent respectively of these demographic groups. The report also concluded that Australians are regular users of radio and television. It cited a survey conducted in 1990 which showed that 86 percent of Australians aged 10 or older listened to the radio. The average listening time was 22 hours per week. The survey also found that ninety five percent of Australians watched television, with the average being 17.5 hours per week. See *News and Fair Facts*, 58.

⁴⁸ Henningham, "The Press," in Cunningham and Turner, *The Media in Australia*, 59. Henningham attributes this decline to the emergence of rival media technologies, including cinema, radio, television, videos, computers and satellite technology.

⁴⁹ The survey was undertaken by B. Dermott and Associates on behalf of Australian Newsprint Mills Pty Ltd, Australia's largest newsprint producer. These figures are cited in Grattan, "Headline/Deadline/Bottomline," 2.

⁵⁰ *ibid.*

⁵¹ Over the course of the 20th century, attitudes about media effects have changed dramatically. In the 1920s and 1930s, there was a strong view that the media had a powerful, almost propagandistic effect on their audiences. A number of theories were proposed in support of this, including the "Bullet" and "Hypodermic Syringe" models. According to these theories, the media was able to deliver an identical message to each member of a mass audience, all of whom understood it in much the same way. According to Ian Ward, "The essential claim was that the media had a powerful, immediate and uniform effect on the opinions and behaviour of individuals comprising the mass audience." See I. Ward, *The Politics of the Media* (Melbourne: Macmillan, 1995), 24. Between the 1940s and 1970s, a minimal effects thesis prevailed. Researchers used empirical studies to argue that the mass media were unlikely to directly affect the opinions,

One popular explanation of media effects is the agenda-setting model proposed by Maxwell McCombs and Donald Shaw.⁵² The thrust of this approach is captured by Cohen: "the media may not be successful much of the time in telling us what to think, but it is stunningly successful in telling its readers what to think about."⁵³ That is, the media does not influence our attitudes about an issue so much, as dictate which issues we believe are important. It does this by focusing on some issues and ignoring others, or by featuring some issues more prominently than others. Consequently, over time, we build up an image of which issues are important and which issues are not. However there are difficulties with this approach. Robert Entman, for example, has argued that "media messages significantly influence what the public thinks by shaping what they think about."⁵⁴ In fact Entman argues that the distinction between "what to think" and "what to think about" can be misleading.⁵⁵ Whilst Entman is probably correct, this model, and other variations thereon,⁵⁶ do point to a powerful media.

A manufactured 'reality'

A great deal of recent research attributes the power of the media to its ability to 'manufacture' the news.⁵⁷ In fact it is often argued that the media create a particular 'reality' which is influenced by what the journalists and

attitudes or behaviour of individual audience members. The minimal effects model, as it was called, argued that the media could not change existing views, only reinforce them. By the early 1970s, however, this view was being questioned, with US researchers in particular moving back towards a powerful media model.

⁵² Maxwell E. McCombs and Donald L. Shaw, "The Agenda-setting Function of the Mass Media," *Public Opinion Quarterly* 36, no. 2 (1972), 176-87.

⁵³ Bernard C. Cohen, *The Press and Foreign Policy* (Princeton: Princeton University Press, 1963), 13.

⁵⁴ See Robert M. Entman, "How the Media Affect What People Think: An Information Processing Approach," *Journal of Politics* 51, no. 2 (May 1989), 348.

⁵⁵ *ibid.*

⁵⁶ These include agenda building, agenda framing and the schemata theory. For a discussion of agenda-building see Lang and Lang "The Media and Watergate," in Graber, ed., *Media, Power and Politics*, 258. Schemata theory is discussed by M. Fischle and K. Stenner-Day, "How Media Influence Public Opinion: A Schematic Approach," *Australian Studies in Journalism* 1 (1992), 159-70.

⁵⁷ See, for example, Gaye Tuchman, *Making News: A Study in the Construction of Reality* (New York: Free Press, 1978).

editors consider important. In line with this approach, Ian Marshall and Damien Kingsbury argue that:

News, far from being a neutral image of reality, as many journalists have argued, is in fact the end product of complex processes involving subjective judgments about significance, and expedient decisions made in the light of a given media organisation's policies, preferences and prejudices.⁵⁸

The result, they suggest, is a "socially constructed reality" which involves "news-making much more than it does the objective reporting of the 'real' however that may be constituted".⁵⁹ News making involves:

The conversion of certain raw materials into headlines, pictures and columns of type in the context of perceived public demands for novelty and excitement (the 'new' in news) and a variety of technical and legal constraints (production deadlines, libel laws). Exclusion is at least as important as inclusion, since most large news organisations publish only a small proportion of the material available to them. Journalists will be influenced by a knowledge of what it would be unwise or inappropriate to write (self censorship), as well as by the appeal of the items that do make headlines.⁶⁰

There is an argument that the final product is influenced by a range of factors, including (1) organisational attitudes and (2) journalists' perceptions of what the audience wants.⁶¹

Converting information into news

A study of journalists and journalism educators by Murray Masterton found that three core elements are required before information can

⁵⁸ Ian Marshall and Damien Kingsbury, *Media Realities: The News Media and Power in Australian Society* (Melbourne: Longman, 1996), 38.

⁵⁹ *ibid.*

⁶⁰ *ibid.*

⁶¹ Although there is considerable research which suggests that while media organisations undertake audience studies, journalists themselves are not necessarily aware of audience needs. Instead, they develop ideas of audience preferences through discussions with a small group of people, including other journalists and friends. According to Ewart, journalists tend to be influenced more by the editor's likes and dislikes than any view they may have of reader preferences. See Jacqui Ewart, "Journalists, Readership and Writing," *Australian Studies in Journalism* 6 (1997): 83-103.

become news.⁶² They are (1) interest; (2) timeliness; and (3) clarity.⁶³ Journalists interviewed by Masterton also identified six news values (or criteria of newsworthiness), which determine if information is newsworthy and therefore how strong a news story it would make. The criteria, in order of importance, were: (1) consequence, (2) proximity; (3) conflict; (4) human interest; (5) novelty; and (6) prominence.⁶⁴ According to Masterton, once the three core elements are identified the information can become news. Whether it does or not depends on the presence of the six criteria. According to Richard Ericson et al judgments regarding the newsworthiness of the information:

[a]re made situationally and contextually, and can shift repeatedly in the course of choosing a frame, deciding upon sources, and writing, editing, and slotting a story. The fact that a story involves multiple considerations (e.g., legal, audience, sources, institutional and organisational resources) and has multiple intended functions (eg information, entertainment, policing organisational life) means that the criteria of newsworthiness are multiple, intersect, and are not easy to sort out by the research analyst. While the analyst may read a normative ordering into criteria of newsworthiness, they normally enter the journalist's choice-making in an unprogrammable way. In making a story the journalist draws upon the vocabulary of precedents to program these elements as he sees fit.⁶⁵

⁶² M. Masterton, "A new approach to what makes news news," *Australian Journalism Review* 14, no. 1 (Jan-June 1992): 21-26. The study was of 300 journalists and journalism educators in 67 countries. Masterton asked the respondents to prioritise 14 criteria which he believed helped to determine the 'newsworthiness' of information.

⁶³ According to Masterton, not only must the news be of interest to a significant number of people, the information must be new or newly available (not been made widely known before). Clarity refers to the quality of writing or presentation.

⁶⁴ Masterton defined these criteria in the following terms: (1) *Consequence* - (also called importance, effect, impact or magnitude) was a measure of the number of people who would be affected by the information. The consequence of a general election or natural disaster is much greater than the result of a football match, he argued. (2) *Proximity* - (also nearness). Information about events happening within close proximity (one's town, city or country) is of greater news value than the same news from a distant country. However geography is not the only measure of proximity. Other measures include society, culture, religion and audience. (3) *Conflict* - includes war, physical violence, legal, psychological and intellectual differences between people. (4) *Human interest* - Masterton says this is the most difficult of the criteria to define in that it overlaps the others. He said it relates to the interest people have in other people, or animals who would not normally make the news. (5) *Novelty* - described as the unusual story. Stories which evoke a 'gee whiz' response from the audience, like the 'man bites dog' type of happening. (6) *Prominence*. This applies to information which is interesting because of who said it or did it, or was involved, rather than for the action itself. Whether they were influential depended on a range of other factors, including culture, politics, nationality, religion or other non journalism influences.

⁶⁵ Richard V. Ericson, Patricia M. Baranek and Janet B. L. Chan, *Visualizing Deviance: A Study of News Organization* (Toronto: University of Toronto Press, 1987), 139.

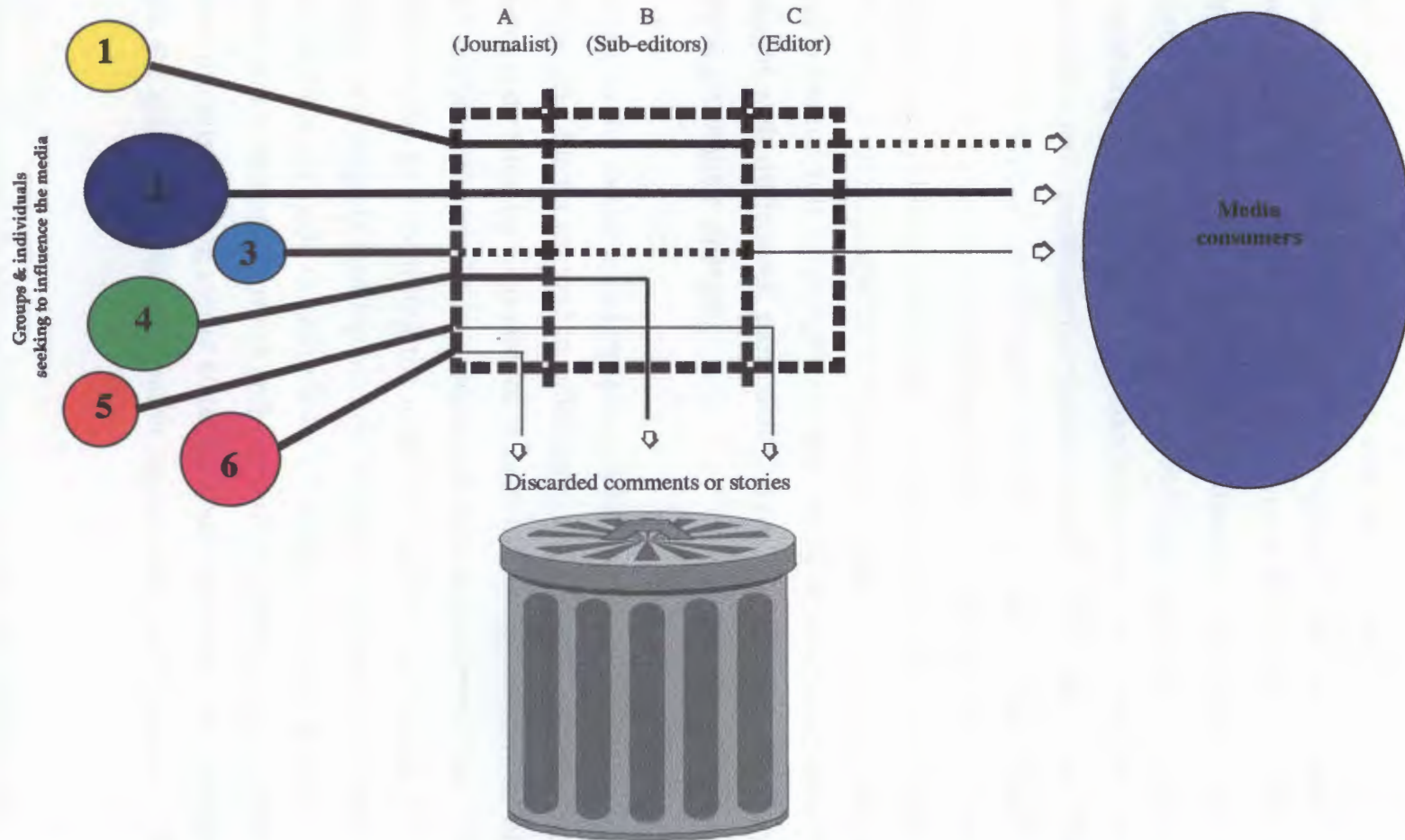
Not only do the journalists decide what is or is not newsworthy, but also whether it is published or not and where it is placed within the paper. The ability of media organisations (and individual journalists) to determine what information is published and thus converted into news is described as its 'gatekeeping role'.⁶⁶ The gatekeeping function of the media is explained in figure 3.1 (overleaf). Whenever an issue develops, there will invariably be a number of groups which seek to have their opinions published. The extent to which they are successful is determined by a range of factors. These include not only the newsworthiness of the information (compared with other issues which might have broken that day), but also the status of the person or organisation commenting and their involvement in the issue (compared with others who are also seeking to have their opinion heard) and, related to these, the amount of space available to the media organisation for coverage of the issue.

As the diagram shows, there are a number of hurdles that news makers or people seeking to have their views published need to clear before publication. They may be able to convince the journalist that their contribution is worthy of inclusion in the story, only to find that it is subbed out by a sub-editor, or the editor (and is consigned to the rubbish bin). There is also a possibility that, although ultimately accepted, the message may be edited (as reflected in the narrower lines).⁶⁷ Thus it can be seen that individual journalists and the media organisations for which they work have the ultimate say on whether a person's views are published (either in whole or in an edited form).

⁶⁶ This phrase is attributed to White who studied a wire service sub-editor whom he named "Mr Gates". See D. M. White, "The Gatekeeper: A Case-Study in the Selection of News," *Journalism Quarterly* 27, no. 2 (1950): 383-90.

⁶⁷ This may be due to a number of factors, including a lack of space, different attitudes regarding style or emphasis, or the possibility that the thrust of the journalist's story is contrary to newspaper policy.

Figure 3.1: Gatekeeping explained



Note: The changes to arrows represent the gatekeeping process at work. For example, the message from group 1 was edited in stage C, the message from group 2 was not edited, and that from group 3 was changed at stage A. The messages from groups 4-6 were all rejected in the editing process. Group 4's message was rejected at stage B, group 5's at stage C and group 6's message at stage A.

Politicians and the media

A powerful media model is further confirmed by the strategies Australian MPs and their staff employ when dealing with journalists. The relationship between politicians and the media has been widely researched and documented over the years. Frequently the relationship has been described as 'symbiotic' or 'parasitic'.⁶⁸ Certainly it is a relationship based on mutual need. For their part, the journalists and the media organisations for which they work need access to the information that politicians, particularly ministers, have at their disposal. Equally, politicians depend on the media to publicise their achievements, their concerns and their criticisms of each other. Without the news media, publicity would be prohibitively difficult and expensive to obtain. Likewise, without access to politicians, the media's news gathering and dissemination role (and especially its watchdog functions) would be fraught with difficulties, particularly given the time constraints under which journalists operate.

Access to the media is not equally available or even granted to all politicians. Media interest in politicians, and subsequent coverage of them, is dictated by a number of factors, including the political office held, and the issue the media is interested in at any particular time. There are other factors too, including the media skills of the politician, and their ability to anticipate and tap into the media's requirements. Backbenchers, for example, struggle to gain media coverage, as do some junior ministers.⁶⁹ Senior ministers and particularly heads of government have less difficulty gaining media coverage (both intended and unwanted). In fact, the position of political leader carries with it an element of built-in

⁶⁸ Western, "The Role of the Media in Politics," 14-23. P. Weller and M. Grattan, "Can Ministers Cope?" In *Australian Federal Ministers at Work* (Richmond: Hutchinson, 1981), 153.

⁶⁹ Frequently the only media coverage backbenchers receive is when they 'cross the floor' in Parliament, speak out against the party line on an issue, are involved in a personal scandal or are accused of breaking the law.

newsworthiness.⁷⁰ As Sigal contends, the newsworthiness of the US President and the career of the political journalist are inextricably linked, given that the leader:

... has in his exclusive possession a type of news that is virtually indispensable to the social and economic security of any reporter assigned to cover the White House full time.⁷¹

Much the same can be said of the situation in Australia. The focus of political journalists tends to be on the head of government - on the prime minister federally, or the various State premiers and Territory chief ministers. This is not surprising. It is widely acknowledged that the Government of the day is more newsworthy than the Opposition, given their different roles and responsibilities.⁷² Whereas the Government is in a position to make decisions which impact directly on voters, the Opposition can only promise or react; it is far more difficult for an Opposition to deliver policies, for example. In terms of responsibility, heads of government have greater obligations on them than Opposition leaders and therefore tend to command greater scrutiny or attention from journalists assuming a watchdog role.

Perhaps it is not surprising, therefore, that the relationship between politicians and the media is often described as precarious or tense, adversarial, and characterised by a lack of trust.⁷³ In part these tensions can

⁷⁰ This view was first expressed by Sigal when discussing the relationship between the US President and the media. Its application has been extended in an Australian context by David O'Reilly to include not only the Prime Minister but also the various State Premiers. See D. O'Reilly, *The Journalist in the NSW State Parliamentary Political Process*, NSW Parliamentary Library Background Paper, No. 5 of 1989, 12.

⁷¹ L. Sigal, *Reporters and Officials: The Organisation and Politics of Newsmaking* (Massachusetts, Heath and Co, 1973), 70. Cited in O'Reilly, "The Journalist," 12.

⁷² See O'Reilly, "The Journalist."

⁷³ For a discussion of the relationship between politicians and the media, see Derek Parker, *The Courtesans: The Press Gallery in the Hawke Era* (Sydney: Allen and Unwin, 1992); P. Wilmoth, "The Pack," *Sunday Age*, Agenda 3, May 22, 1994; P. Goward, "The Medium, Not the Messenger," Commonwealth of Australia, Senate, *Papers on Parliament*, No. 27, March 1996, 49-62; A. Summers, "The Media and Parliament: Image-Making and Image-Breaking," Commonwealth of Australia, Senate, *Papers on Parliament*, No. 31, June 1998, 1-14; S. J. Tanner, "Watch Dog or Attack Dog? The Media, Politics and Ethics," in N. Preston, C. Sampford and C-A. Bois, eds., *Ethics and Political Practice: Perspectives on Legislative Ethics* (Sydney: Routledge/Federation, 1998), 90-107; R. Tiffen, *News and Power* (Sydney, Allen and Unwin, 1989); I. Ward, *Politics of the Media*.

be traced directly to the differing expectations of politicians and the media about their own and each others' obligations within the relationship and reflected in the language used to describe the relationship. For example, the press gallery is often described disparagingly as a "pack".⁷⁴ This is a criticism of the fact that journalists, even those from competing organisations, tend to work together on stories and, consequently, there is a 'sameness' in the stories produced. Bennett attributes this to: (1) the sense of solidarity which journalists who cover the same rounds develop; and (2) the tendency to produce formula stories.⁷⁵ He argues:

Once a reporter has been assigned to a routine event for which news formulas are well known, the temptation to produce a formula story is bound to be strong. Add to this temptation the presence of a tight deadline and an editor who will question significant departures from the formula used by other reporters, and the temptation to standardise becomes even stronger. Finally, put the reporter in a group of sympathetic human beings faced with the same temptations, and the use of formulas becomes easily rationalised and accepted with the social support of the group.⁷⁶

It has even been argued that this group pressure can suppress independent news judgment.⁷⁷ For their part, however, journalists defend their coverage of issues, and are critical of MPs for seeking to 'manage' the news.

Media management strategies

Certainly there is evidence to support this. Politicians have adopted a range of strategies which are designed to gain positive media coverage for themselves and negative coverage for their political opponents. According to Rod Tiffen, these strategies are both overt and covert.⁷⁸ They can include the timing of announcements so as to maximise or minimise

⁷⁴ They have also been likened to sharks circling for a kill. See, for example, Larry Sabato, *Feeding Frenzy: How Attack Journalism Has Transformed American Politics* (New York: Free Press, 1991); Wilmoth, "The Pack," and Tanner, "Watchdog or Attack Dog?"

⁷⁵ Bennett, *News: The Politics of Illusion*, 115-6.

⁷⁶ *ibid*, 116.

⁷⁷ Mark Fishman, in Bennett, *News: The Politics of Illusion*, 116.

⁷⁸ R. Tiffen, *News and Power*, especially chapters four and five.

media coverage, depending on whether the announcement is likely to be received positively or negatively; the use of doorstops⁷⁹, briefings, backgrounders and leaks in preference to formal press conferences⁸⁰; media releases rather than face to face contacts with journalists⁸¹; and the employment of media advisers and press secretaries⁸². Although the strategies may differ, the intention is nonetheless the same - news management.

Whilst carefully cultivating their relationships with sources, journalists generally play down the extent to which they rely on media releases, briefings and other 'manufactured' information. Journalists seek to maintain the impression that they are independent, even aggressive, in

⁷⁹ These are less structured than press conferences and work to the advantage of the politician, allowing them to appear on television, say what they want, and then walk away from the phalanx of cameras, microphones and recorders without appearing to be avoiding the journalists. The doorstep is particularly suited to the electronic media, because it allows the politician to speak in 'headlines' or short 'grabs'. This approach does nothing to endear politicians to the print media journalists, however, who generally want more detail and are in a position to devote more space to coverage of an issue.

⁸⁰ Historically the formal press conference has been the mainstay of government-media relations. These tended to be free ranging, with journalists having the opportunity to ask questions on a variety of issues - from the predictable through to the unexpected. Journalists like press conferences because they enable them to develop a line of questioning on a particular issue. That is, they are able to feed off each other's questions to build up a story. Formal press conferences also give credibility to the media's watchdog role. However in recent years, particularly since the advent of television, MPs, even those who can be considered competent media performers, have tended to eschew press conferences because of a fear that they will be 'captured' by the process. They are not able to suddenly call an end to the press conference in the middle of questioning on a politically contentious issue and walk out without appearing to be 'running away'.

⁸¹ Ward has argued that the heavy reliance of journalists on media releases has seen their role change from that of hunter to one of harvester. See Ian Ward: "Journalists as Hunters or Harvesters," *Australian Journalism Review* 13 (1991): 52-57.

⁸² Many of the people employed in these positions were former journalists or public relations specialists. Those with a journalistic background were especially valuable as they understood the requirements of news organisations. Frequently, because they came out of the press gallery, they would also have good contacts with other journalists. Not only did the press secretaries understand the news requirements of journalists, they also were aware of the deadlines under which they operated and thus were able to factor these into account when deciding when to release news. The relationship between press secretaries and journalists can often be tenser than that between the MP and the media. Whilst acknowledging that they can be helpful in providing information, journalists also believe that press secretaries and media units serve as a barrier between the people and the minister or MP, and as such can undermine or inhibit the accountability process. This is particularly the case in a situation where an MP is being asked to explain his or her conduct in relation to a matter the media is pursuing. The press secretary can act as a shield for the MP concerned, refusing journalists direct access. In such situations the Government may decide to 'bunker down' that is to respond by way of a media release or a comment from the press secretary, rather than via a direct exchange between the journalist and the MP. Whilst this enables the Government to shield MPs who are not particularly competent

their relationship with MPs, rather than manipulated. However this view is not universally shared. Paul Weaver, for example, describes the relationship as "one of structured interdependence and bartering within an atmosphere of amiable suspiciousness".⁸³ Lance Bennett suggests that the media display an "empty adversarialism" in their relationship with politicians. He argues:

If the media were truly adversarial in their dealings with politicians, they would face a serious dilemma. The news could end up - discrediting the institutions and values on which it depends for credibility.⁸⁴

Bennett describes the displays of adversarialism between MPs and journalists as part of a ritual which both sides help to promote and reinforce:

As with most rituals, news reporting requires genuine involvement of actors in their roles. Both public officials and journalists are personally involved in the conflict over the presentation of daily news information. Both sides have enough to gain and lose on a personal level to make the display of aggression genuine. Nevertheless, each side also stands to undermine its own legitimacy by attacking the other on the fundamental value questions.⁸⁵

He argues that often this adversarialism is personally directed and that much media questioning of politicians "signalled clear deference to office and institution".⁸⁶ This deference to office and focus on individuals is reflected in the media's treatment of political corruption to which the chapter now turns.

media performers, it can result in critical media coverage and also undermine government-media relations.

⁸³ See for example, Paul H. Weaver, "The new journalism and the old - thoughts after Watergate," *The Public Interest* 35 (Spring 1974): 67-88.

⁸⁴ Bennett, *News: The Politics of Illusion*, 124.

⁸⁵ *ibid*, 127.

⁸⁶ *ibid*, 125.

Corruption as news

Stories involving 'corruption' or allegations thereof, would be expected to appeal to the public service minded and commercially driven media alike. It is not difficult to see how corruption stories could incorporate the core elements, and at least some of the newsworthiness criteria identified by Masterton. In fact Masterton's criteria seem to support both an informational and an entertainment role for the media. 'Interest' is relatively easy to establish in the case of corruption stories. 'Interest' can be found in public attitudes towards corruption and particularly the view in liberal democracies that such conduct is wrong, illegal, anti-democratic or immoral, depending on the viewpoint of the individual. As such stories involving claims of corruption are likely to pique community interest.

'Timeliness' is more difficult to establish. For example, it could be argued that allegations of corruption are never 'timely' because they further undermine already stretched community support for MPs and political institutions. Alternatively, it could be argued that such allegations are always 'timely' because they can remind public figures that wrong-doing will be publicised if disclosed. The timeliness of corruption allegations seems to be confirmed by the considerable publicity which the corruption inquiries established in various Australian states during the late 1980s and early 1990s received in the media.

'Clarity' is not quite so problematic. As Masterton himself suggests, this relates to the quality of writing or presentation. Media organisations or journalists wanting to maintain reader interest in an issue are obliged to present the information in such a way as to stimulate people. This applies equally to public service and entertainment-focused media.

In relation to the criterion of newsworthiness, it would be expected that corruption stories would satisfy at least four of Masterton's news values - consequence, conflict, prominence and (in a national/state context)

proximity. There are a number of reasons why political corruption meets these criteria and hence could be considered newsworthy. The first has to do with the attitudes towards corruption, however defined, discussed above. Secondly, it satisfies Masterton's criteria because corruption frequently involves 'personalities', who are often high profile public figures. As already discussed in the context of political leaders, personalities by their very nature or by virtue of the positions they hold, are newsworthy. Virtually anything they say or do is regarded by the media as newsworthy. Thirdly, there is invariably a motive. These can be many and varied, ranging from an attempt to buy an MP's vote in the Parliament, to trying to shore up one's hold on government through political patronage.

By possessing some, or all, of these characteristics, corruption stories are virtually guaranteed media coverage. Unfortunately, however, that does not mean they will be covered in a positive or even dispassionate manner. There is a risk that the trend away from straight reporting to infotainment can influence the way in which corruption stories are reported. That is, they can tend to focus on who was involved and what they were alleged to have done (the colour and the conflict) rather than the more serious economic and political consequences which normally flow from corrupt conduct. If the media is taking its 'watchdog' role seriously, one would expect the coverage to extend beyond the 'Who, What, Why, When, Where and How' which guides most journalistic writing to focus on the systemic or democratic consequences of the corrupt act, if any. And yet there appears to be a risk that such stories can foster a media feeding frenzy of the kind discussed earlier in the chapter, which not only contributes unnecessarily to the loss of faith in the system, but might also help explain the loss of faith in the media and journalists as well.

Identifying the constraints

As the earlier discussion showed, there are a number of constraints which can affect the media's ability to perform its (expected) accountability functions. In the case of corruption, these constraints are more extensive. One of the difficulties was revealed in chapter two where it was shown how corruption is a particularly complex issue, from both a theoretical and practical perspective. Consequently it is easy to understand how journalists could struggle with the meaning of corruption if academics and practitioners cannot agree on a definition. Likewise it is possible to understand why they might struggle to accept formal-legal definitions which label some conduct 'corrupt' when clearly that definition is at odds with community standards (or expectations).⁸⁷

Linked to this is the question of training identified earlier. Most journalists are generalists, not specialists. Whilst increasing numbers of journalists are entering the profession with university degrees, very few have law degrees, economics or business degrees or even the forensic skills needed to understand the complexities of a particular corruption inquiry. One way in which media organisations obtain news is by developing rounds.⁸⁸ Journalists tend to be assigned to particular rounds where they build up expertise and, most importantly, contacts. Political corruption is a difficult issue in that it does not necessarily sit perfectly into one of the standard rounds.⁸⁹ Whilst one of the political rounds is an obvious starting point, as the issue develops it may also move into the jurisdiction of another roundsman, for example, police or courts. These rounds invariably involve the need for different knowledge and contacts,

⁸⁷ Although note Henningham's research which suggests that journalists do not allow their own political beliefs to influence their coverage of an issue. See J. Henningham, "Political Journalists' Political and Professional Values," *Australian Journal of Political Science* 30, no. 2 (July 1995): 321-34.

⁸⁸ Australian media organisations tend to establish a large number of rounds, the most notable including police and courts, state politics, federal politics, local government, education, health and environment.

and thus may affect the ability of individual journalists to cover an issue effectively.⁹⁰

There is another element to this as well. Corruption can be so complex as to make its presentation in traditional journalistic news formats (particularly electronic) difficult. For example, radio news programs, with their emphasis on voice grabs, and television news, with its reliance on visual footage, are hardly suited to a detailed analysis of a major corruption scandal. Newspapers are better suited to this, because they can devote more resources and allocate more space than their electronic counterparts to providing backgrounders and opinion pieces. However they need to maintain 'interest' and thus will be expected to look for the 'colour' and 'angles' which encourage people to read on and not simply scan the headlines. To do this they often employ specialist writers or commentators and supplement hard news with cartoons, photographs and extracts of evidence.

Even so, newspapers have come under some criticism for their coverage of corruption. In a British context, Alan Doig argues that despite the media's self-proclaimed watchdog role, "few of the major cases of corruption or misconduct in British politics during the twentieth century originally emerged as a result of media investigations".⁹¹ In an Australian context these concerns are shared by Simons, who has asked why her profession "so rarely succeeds in detecting wrongdoing, and uncovering the corruption and cronyism that undoubtedly proliferates".⁹² Simons said that while the media had undoubtedly played its part in exposing corruption in Australia, she believed that it had also "helped contribute to

⁸⁹ Despite this, public sector corruption is obviously regarded as a major problem in NSW. This is reflected in the decision of some media organisations to assign journalists to full-time coverage of the ICAC and its inquiries.

⁹⁰ For this reason, it is not unusual for media organisations to assign journalists from a number of rounds to cover issues which overlap.

⁹¹ Alan Doig, "Restraints on Investigatory Journalism," in M. Clarke, ed., *Corruption: Causes, Consequences and Control*, (New York: St Martin's Press, 1983), 75-6.

⁹² Simons, "Inside the Press Gang," 6.

a climate in which corruption, mateship and venal public policy have flourished".⁹³

One explanation for this is the apparent reluctance of media organisations to devote resources to investigative journalism as a means of exposing corruption.⁹⁴ Doig argues that three broad constraints work against the media playing an effective investigatory role to uncover corruption. These he identifies as (1) collecting the information; (2) publishing the information; and (3) integrating the benefits of that publication with the primary objectives of the organisation concerned.⁹⁵

Despite its relatively innocuous appearance, the first is not necessarily straight-forward. Uncovering the information required to verify hunches or allegations can often involve risk-taking on the part of the journalist.⁹⁶ Both academics and journalists say there is a reluctance to undertake investigatory work which might alienate the source, particularly if he or she is a key source whom the journalist relies on regularly for information.⁹⁷ If the story is published or put to air, but the allegations against them are disproved, there is a risk that the journalist will be denied access to the source, and this could threaten his or her career, particularly if they are assigned to a news round which requires such interaction.⁹⁸

⁹³ *ibid*, 8.

⁹⁴ Although in an Australian context Schultz argues that there has been an increase in investigative journalism since the 1980s. See J. Schultz, "Investigative Reporting Tests Journalistic Independence," *Australian Journalism Review* 14, no. 2 (1992): 23. Other writers disagree, suggesting that media companies are reluctant to pour money into investigative journalism if there is no guarantee of a story at the end. See, for example, P. Dickie, "The Media's Role in the Criminal Justice System," *Social Alternatives* 11, no. 3 (1992): 27.

⁹⁵ Doig, "Restraints on Investigatory Journalism," 76.

⁹⁶ This can involve both physical risks and risks to one's career as well. For example, in preparing his documentary which led to the Fitzgerald inquiry in Queensland, Australian journalist Chris Masters and his film crew had their television camera smashed. See P. Dickie, *The Road to Fitzgerald and Beyond* (St Lucia: UQP, 1989), 143.

⁹⁷ Given this, it is interesting that much of the journalistic work to uncover police corruption is undertaken by people outside the police round. See C. Masters, "Taking Pride in Journalism," *Australian Journalism Review* 10 (1988): 4-9.

⁹⁸ This was also the situation in Queensland in the lead-up to the Fitzgerald inquiry. Local political journalists (and media organisations) were loathe to investigate allegations of corruption because of fears of reprisal from the Government. Journalists were concerned that they would be refused access to the Premier or other Government ministers. For their part the media

Despite a proliferation of Freedom of Information legislation (FOI) in recent years, journalists still find it difficult to access information which helps them uncover or confirm corruption.⁹⁹ As Murphy argues:

Because of government and business secrecy, investigation only takes place where either someone with information complains, or an inside informant 'blows the whistle' on the operation of government or business bureaucracy. This means that the tighter and more ruthless the control, or the more dedicated the members of the bureaucracy, the less likely is it to be investigated. In this sense it seems most likely that the most potentially corrupt and dangerous organisations are impregnable to investigation.¹⁰⁰

The difficulties are not restricted to the collection of evidence. Journalists and media organisations can also find that publication can be problematic and may result in legal actions being brought against the journalist who wrote the story and/or the newspaper which published it. Consequently, responsible media organisations will not risk defamation actions brought on the basis of flimsy or unsubstantiated evidence which often emanates from sources who have a 'particular axe to grind'. This view is also taken by Murphy, who highlights the deterrent value of threatened legal action. He said that writs are a cheap and easy response against investigative journalists.¹⁰¹ In Australia and the UK, journalists and media organisations do not enjoy the same protection as that provided to their US counterparts under the Sullivan principle. Under the Sullivan principle, public figures must demonstrate the defendant in a defamation action acted with malice. That is, they either knew the statement to be false or they recklessly disregarded the truth. According to Weaver and Bennett, the US Supreme Court adopted this standard because of a

organisations were concerned that lucrative government advertising would be withdrawn from their publications. See J. Orr, "Politics, News Management and Monopolies – A Consumer Issue?" In Schultz, *Not Just Another Business*, 95-114.

⁹⁹ However the author found from his own discussions with journalists that some reporters believe governments have deliberately quarantined some information from FOI claims and have made searches both expensive and time consuming. Whilst this is clearly intended to prevent journalistic fishing expeditions, it can also circumvent genuine requests for information.

¹⁰⁰ D. Murphy, "Journalistic Investigation of Corruption," in Clarke, *Corruption: Causes, Consequences and Control*, 72.

¹⁰¹ *ibid*, 72-73.

"commitment to the principle that debate on public issues should be uninhibited, robust and wide open".¹⁰² They also said that while the Court recognised the problems this might create, freedom of discussion was integral to the political process.¹⁰³ In Australia and Britain the maxim 'you publish at your peril' is etched in the minds of journalists and publishers alike. Few are prepared to risk profits by openly inviting legal action by an 'aggrieved' public figure. In Britain, plaintiffs are only required to establish that the journalist or media organisation made defamatory statements that referred to them, or that reasonable people would accept referred to them. Australian defamation law is based on the British system, although it is slightly more complex, given that it is considered a state rather than a federal matter. This has meant that the standard of proof varies from state to state.¹⁰⁴ Although according to Grabosky and Wilson:

[i]n Australia generally, a statement is defamatory if it tends to injure a person's reputation, or to make that person an object of hatred, contempt or ridicule. No proof of actual injury to reputation is required in order for a defamation action to succeed.¹⁰⁵

Whilst O'Meara suggests that traditional Australian defamation law may have "prevented the publication of matters which are socially useful or important, but defamatory, which have later been proven true", he also suggests that a number of recent High Court rulings may have paved the way for a more liberal approach.¹⁰⁶ According to O'Meara, the judgment will also deter public figures from taking legal action against defamatory statements, and bring journalists' codes of conduct into conflict with defamation law. Whilst the Lange decision has been welcomed by media

¹⁰² See R. L. Weaver and G. Bennett, "New York Times Co. v Sullivan : the "Actual Malice" – standard and editorial decisionmaking," *Media Law and Practice* 14, no. 1 (1993): 2.

¹⁰³ *ibid.*, 3.

¹⁰⁴ On the need for uniform defamation legislation in Australia, see Dean Wells, "Towards Uniform Defamation Laws," *Australian Journalism Review* 13 (1991): 39-44.

¹⁰⁵ P. Grabosky and P. Wilson, *Journalism and Justice: How Crime is Reported* (Sydney: Pluto Press, 1989), 80.

¹⁰⁶ Stephen O'Meara, "A New Constitutional Formula for Freedom of Political Discussion: Lange v ABC," *Australian Studies in Journalism* 6 (1997): 66-82. The cases include *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211; and *Lange v Australian Broadcasting Commission* (1997) 145 ALR 96. Of these decisions, Lange is possibly considered the most important, because it has extended the qualified privilege defence.

organisations, there is little doubt that Australia's and Britain's defamation laws do provide a disincentive to journalists and media companies seeking to report on ethical breaches or allegations thereof involving public figures. This may also help to explain why there is not as strong a tradition of investigative reporting in Australia as there is in the US.¹⁰⁷

The third criterion identified by Doig links back to the relationship between the media organisation's public service and commercial roles and in particular whether these differing roles enable the media to undertake such investigations. According to Masters, the answer is yes. He argues that investigative reporting is both a necessary and invaluable endeavour for journalists seeking to expose corruption:

What I have discovered is the more research you do the more levels of truth you move through. One hour's investment in a story might indicate a prominent public official is a saint. One day's investment in the same subject might suggest he is a sinner. Spend a bit more time and you might begin to understand the system in place, which encourages him to sin. Our business is essentially a volume industry. Journalists are rewarded for quantity, not quality. Most of us measure the time we spend in hours. I was lucky: I had three months to do "The Moonlight State". I hope our proprietors have seen the lesson. The story, in a sense, launched a thousand headlines. Clearly the investment is worthwhile.¹⁰⁸

Australian media proprietors, however, do not appear to share Masters' enthusiasm. According to Schultz, the lack of institutional support can be attributed to a number of factors, including the clash between journalistic values on the one hand and commercial and political considerations on the other; the decline in the number of media outlets and a reduction in the amount of space, time and resources required for investigative reporting.¹⁰⁹

¹⁰⁷ O'Meara, "A New Constitutional Formula," 80.

¹⁰⁸ Masters, "Taking Pride in Journalism," 6.

¹⁰⁹ See J. Schultz, *Reviving the Fourth Estate*.

That is not to say that journalists or media organisations ignore corruption as being too difficult or risky to cover, because that is not the case. Instead, they tend to be more selective. Rather than taking an investigatory role, journalists and media organisations tend to focus on corruption that has already been exposed, when charges have been laid or are pending.¹¹⁰ In such situations the media is guaranteed a story. Also, there is less likelihood of recriminations against the journalist or the media organisation. In short, such inquiries present the media with easy news. They are relatively easy to plan for, particularly when hearings or court cases have been scheduled. The chief of staff is able to allocate staff and to earmark space within the newspaper knowing that the story will happen.

Promoting an anti-corruption role

Despite the impediments confronting journalists and the question marks surrounding the willingness or ability of media organisations to conduct investigations into corruption, there is a widely held view that the media can play an important anti-corruption role. This view appears to be held by the people who have headed Australia's major corruption inquiries during the 1980s and 1990s. That they consider the media a partner in the fight against corruption – is reflected in the provisions made for journalists at the various inquiries established during the last decade.¹¹¹

¹¹⁰ There are a few exceptions. The Fitzgerald Inquiry in Qld was attributed to the investigative work of two journalists, Phil Dickie and Chris Masters. Dickie worked for the Brisbane newspaper the *Courier Mail*, and Masters for ABC television, based in Sydney. Other investigative journalists who have broken corruption stories include Bob Bottom and Wendy Bacon. However these appear to be the exception rather than the rule. None of the other major inquiries which took place in Australia during the late 1980s and early 1990s could be attributed to investigative journalists.

¹¹¹ In the case of the Fitzgerald Inquiry, WA Inc., and the ICAC, elaborate mechanisms were put in place to ensure that the media were catered for, both in the lead-up to and during the inquiry process. This included the provision of special facilities at hearings; the granting of special status to journalists which allowed them access to exhibits and other data which would be denied the average member of the public, and also regular access to the person or people heading the particular inquiry, or someone who was the designated spokesperson, for information or comments which could be run in news bulletins or newspaper stories. For their part, the media were certainly attracted to these hearings. In its Report, for example, the WA Inc Royal Commission advises that it issued 150 media passes to journalists over its two year life span. See WA Inc Report, part 1, vol. 6, appendix 4.9-13. The Fitzgerald Inquiry Report shows that 23 media organisations regularly covered its proceedings. These included four television

The decision to cater for the media was rewarded through on-going coverage of the inquiries.

The reason for such media interest is understandable, particularly if the inquiry is likely to involve a high profile public figure as was the case in each of the Australian inquiries cited above. In the WA Inc, Metherell and Rouse inquiries, sitting or former premiers were summonsed and gave evidence. In the Fitzgerald Inquiry, a number of ministers were named. Once these figures entered the witness box to give evidence they were in effect a captive of the process. Whilst they may have been able to employ media-management strategies in the period leading up to the inquiry to limit the amount of information that entered the public arena, there were fewer options available to them once cross examination began. Their demeanour, the answers they gave, and those they declined to provide were subjected to close scrutiny, not just by the Commission, but by the media present. Likewise, the evidence of all other witnesses was subjected to similar analysis, with the purpose of determining what actually happened. In part this was due to the way in which the inquiries were conducted. The ICAC inquiry process, for example, is inquisitorial.¹¹² But the way in which the hearings are conducted - in a courtroom-like atmosphere, featuring a Commissioner whose powers in many respects may be likened to those of a judge, along with counsel assisting, and frequently counsel representing various witnesses - suggests an adversarial process. It paints a picture of people on trial and that is the way the media tends to portray it.

Not only did these inquiries provide the media with easy stories, but they also appealed equally to the responsible media organisations - those who

networks, four radio stations, 14 newspapers and Australian Associated Press. See Fitzgerald Report, Appendix 19, A235. In the case of the ICAC, the inaugural Commissioner, Ian Temby QC, established a committee, which included journalists, to identify the media's requirements before the Commission was fitted out. This ultimately included a media room, with an audio connection to the main hearing room, desks, chairs and a sound booth for radio journalists. Media representatives were also allocated seats in the main hearing room.

¹¹² For a discussion of the distinction between inquisitorial and adversarial proceedings see the ICAC discussion paper "Inquisitorial Systems of Justice and the ICAC: A Comparison," November 1994.

favoured an informational role - and to those whose emphasis was on entertainment. For the former, such inquiries provided them with an opportunity to exercise a 'watchdog role', that is, to keep public figures accountable and to help promote an anti-corruption message. For those organisations which sought to entertain, such inquiries also catered to their formats. They provided colour and conflict, allegations and counter allegations, and an opportunity to cover proceedings (some of which may later be disproved), without the fear of possible legal action which hangs over investigative reporting.¹¹³

Balancing the good and bad

Despite their efforts to accommodate the media, the people who headed these inquiries tended to have mixed feelings about their role and priorities in covering these proceedings. For example, both Ian Temby QC and Tony Fitzgerald QC, the head of the ICAC and the Qld corruption inquiry respectively, frequently bemoaned media coverage of their respective inquiries. In his report, Fitzgerald acknowledged both the good and the bad effects of media coverage. Whilst conceding that "[t]he media, has, on balance been helpful to this Inquiry",¹¹⁴ he also provided an important qualifier:

There was for the most part a determined effort to be fair in reporting the proceedings, although there were some lapses in standards which caused concern. 'Scoops' were reported which unintentionally but unnecessarily hindered the Commission's work. Sometimes admissible evidence with a 'hearsay' component was reported as though the hearsay was probative. The names of prominent persons mesmerised some journalists and their employers.¹¹⁵

¹¹³ However this has been criticised by a number of writers, and even the ICAC acknowledged the damage media reporting could inflict on reputations. See ICAC, *Report on Investigation into North Coast Land Development*, July 1990.

¹¹⁴ Fitzgerald Report, 20

¹¹⁵ *ibid*, 21.

On another occasion he said: "... the media has a tremendous capacity either to assist or, conversely, to impede an inquiry such as this." At one stage he almost pleaded:

Surely it is not beyond the media to understand that the task of the Commission is both difficult and important ... and that, irrespective of the short-term newsworthiness of the immediate publication of the views of potential witnesses, the difficulties confronting the Commission are immeasurably increased by the interference of journalists. What is being done by the Commission and when and why involves careful planning, which cannot be effective if the Commission must contend not only with those who have been engaged in illegality and corruption, who have much to lose and may be expected to take steps to avoid detection, but unforeseen forays into the arena by some journalists in search of a sensation. Surely it is understandable by the media that there is a point at which there is a responsibility to the public which transcends the impulse for a headline.¹¹⁶

ICAC Commissioner Ian Temby likewise saw the positives and the negatives of media coverage of corruption inquiries. Temby was in a somewhat different position to those people heading the WA Inc, Fitzgerald and Rouse inquiries. The ICAC was a permanent anti-corruption body which had a brief to not only investigate individual allegations of corruption, but also to educate people about the costs of corruption and, in the process, to try and change community attitudes towards it. Whilst Temby appeared relatively satisfied with media coverage of the ICAC's educational and community relations functions, he was critical of much reporting of the Commission's investigations and inquiries. Like Fitzgerald, Temby also bemoaned the tendency of journalists to focus on the names: "[t]he trouble is that always the media's emphasis is upon personalities, not issues and we are always trying to get

¹¹⁶ *ibid*, 197. Fitzgerald was also concerned at the media's use of evidence and on occasions threatened to take action for contempt. At different times during his inquiry he imposed temporary bans on the publication of some evidence after some sections of the media had rejected his earlier requests that the information be dealt with sensitively. And he responded to the situation whereby there was a potential delay between the airing of allegations before the Commission and the accused individual being given a chance to respond. Fitzgerald addressed this situation by allowing people who were named in evidence the right to appear before the Commission and give a statement in their defence, or for the media to approach people named and publish comments they made outside of the Commission.

to the issues, not the personalities," he said.¹¹⁷ At one stage Temby was drawn to comment: "there are occasions when stories have been written in a way that I do not favour; but we cannot write stories for the press, and I do not think we should try to do so."¹¹⁸

The concerns about the impact of media reporting of corruption inquiries was not confined to the bodies themselves. For example, when the legislation establishing the ICAC was being debated, civil liberties groups, judges, the Opposition and the media all expressed concern at the powers intended for the new body. There was also considerable opposition to an early proposal that ICAC inquiries be televised and that this footage be provided to media organisations for their news broadcasts.¹¹⁹ The concerns were summed up by former Royal Commissioner and retired judge, Athol Moffitt, who argued:

What is wrong or bad is nearly always more newsworthy than what is good ... It is more newsworthy to publish allegations of scandalous conduct against a public figure than to publish the later more lengthy explanations or proofs of innocence. Time pressures are incompatible with publicity on a later day of such necessarily longer or exculpatory or explanatory material.¹²⁰

¹¹⁷ *ibid.*, 58.

¹¹⁸ *ibid.*, 4. Such was Temby's frustration that he even began to conduct off-the-record briefings for selected journalists. However these ceased when he was criticised by other journalists and the parliamentary committee responsible for the ICAC. See NSW Parliament, Committee on the ICAC, *Collation of Evidence*, October 15, 1993, 34. Nonetheless Temby defended the briefings, arguing that they enabled a two-way flow of information between the Commission and journalists, and helped ensure that journalists were: "... properly informed ... and the stories published are accurate". Like Fitzgerald, Temby was concerned that: "... those who are concerned to prevent us from achieving our end work the media hard." Echoing the concerns expressed by Fitzgerald, Temby said that if the ICAC were forced to have "absolutely transparent dealings with the media" it would be the only organisation within the State to do so. See *Collation of Evidence*, October 14, 1993, 59.

¹¹⁹ The request came from the Nine Network on February 22, 1989. See NSW Parliament, Committee on the ICAC, *Report of an Inquiry into a Proposal for the Televising of Public Hearings of the Independent Commission Against Corruption*, June 1990, 1. Henry Mayer, for example, argued that the decision to allow television cameras into the hearing room would not help people understand the ICAC or its proceedings. Rather, he argued, people would be judged superficially and their reputations unfairly damaged. (Report, 25). The then President of the Bar Association and current ICAC Commissioner, Barry O'Keefe QC, argued that the pursuit of ratings encouraged television to focus on sensationalism. He said there was a risk the requirements of television would encourage theatrical performances from the commissioner or counsel (Report, 13).

¹²⁰ Report, 20.

The Committee ultimately rejected the request, arguing that the rights of a witness to a fair trial which may arise from the ICAC's investigations outweigh the public interest benefits associated with televised coverage of the inquiry process. It argued:

... visual images of a witness giving evidence before the ICAC have the potential to be extremely prejudicial. Furthermore, what may be a 'balanced and fair report' of an ICAC hearing may, because of the special powers of the ICAC, be a report of evidence totally inadmissible at a subsequent trial. The sensational nature of and wide publicity given to many ICAC hearings may prejudice a potential jury and a witness's right to a fair trial.¹²¹

Thus it can be seen that the anti-corruption bodies regarded the media as something of a chameleon. Whilst journalists covered the corruption inquiries, the authorities were not certain whether they were motivated by a public service or entertainment ethic. On the one hand they believed that the media had an important anti-corruption role to play, in line with its fourth estate obligations, but on the other they were concerned that this was subsumed by the drive for headlines (and thus commercial considerations).

Conclusion

The emergence of the media's accountability role can be traced to the 18th and 19th centuries. This role grew in response to public concerns over the misuse of political power. As the foregoing discussion shows, this manifested itself in the notion of the media as the 'Fourth Estate'. However as Schultz and other writers have indicated, today there appears to be a gulf between the rhetorical ideals, which are still espoused by journalists and media organisations, and reality. That is, the effectiveness of the media as the Fourth Estate, or even the commitment of the media to a Fourth Estate function have been questioned. The reasons for this were discussed in the first part of the chapter. These included the clash between the media's public service responsibilities and, in the case of most

¹²¹ *ibid*, executive summary.

organisations, the obligation to make a profit. Linked to this was the changing focus of the media, with greater emphasis being placed on the mix between news and entertainment (infotainment). The chapter highlighted a number of other concerns, including the increasing concentration of media ownership, influences in proprietorial and managerial influence over editorial content, and low community attitudes towards journalists, particularly those working in the print media.

In the second part of the chapter it was argued that although newspaper circulation has declined since the 1950s, the media is still regarded as a powerful influence on community attitudes. Drawing on the work of McCombs and Shaw, Cohen, and Entman, it was argued that the media is able to influence community attitudes by shaping what they think about. It was also argued, in line with the work of Tuchman, and Marshall and Kingsbury that the media is able to manufacture a particular reality. The criteria which journalists use when determining the newsworthiness of stories was identified by Masterton. These include three core values: (1) interest, (2) timeliness and (3) clarity; and six news values: (1) consequence, (2) proximity, (3) conflict, (4) human interest, (5) novelty, and (6) prominence. Masterton's model will be used for the analysis in chapters 7-10.

It was also argued that the existence of a powerful media model is confirmed by the strategies employed by politicians and their staff to manage the news. Whilst the relationship is a symbiotic one, it is also tense and, at times, aggressive. In part this was attributed to the differing expectations the journalists and politicians had of their respective roles in the relationship. Drawing on the work of Bennett, Szasz, and Gronbeck, it was argued that the relationship and their coverage of politics is ritualistic.

Finally, the chapter looked at media coverage of corruption. In anticipation of the discussion in chapters 7-10, it was argued that the

media could be expected to cover stories involving allegations of corruption. It was shown how they could satisfy at least four of Masterton's news values (consequence, conflict, prominence and proximity). However the discussion also raised a concern – that whilst such stories are likely to appeal to the responsible and irresponsible media alike, there is a risk that because of the trend towards infotainment that the emphasis will be on the colour and conflict (the who and what) rather than on the consequences (political and economic). This was highlighted in the comments of anti-corruption fighters Fitzgerald, Temby, and Moffitt. Whilst in defence of journalists it was argued that there were a number of constraints which may make their job difficult (political, institutional and legal), they and the media organisations were nonetheless vulnerable to criticism (as the comments of Doig, Murphy and Simons reveal). Issues such as secrecy, relationships with sources, media management strategies adopted by people under investigation, and of course a reluctance by media organisations to put resources into long term investigations, all mitigate against an effective investigative media role in uncovering corruption. That is, it appears the media appears better suited to the coverage of corruption that has already been exposed.

Chapter 4

The Metherell Affair:

Background and early attempts at justification

Introduction

This chapter - the first to deal with the case study - covers the period leading up to the ICAC inquiry into the Metherell affair. It begins with the reasons for, and negotiations over, Metherell's resignation from Parliament and appointment to the NSW public service, and develops a chronology of events. It then turns to the early attempts of the Government, particularly Greiner and Moore, to justify the appointment and the responses their early justifications generated. In so doing, this chapter will begin to highlight the difficulties discussed in chapter two regarding the labelling of conduct as 'corrupt' or 'not corrupt'. The chapter will show how the Opposition and the Independents not only rejected the justifications offered by the Government, but also appeared to use different standards when assessing such conduct. In the case of the Opposition, the standard used was a formal-legal one, in the case of the non-aligned Independents, it was based on moral beliefs.

The chapter seeks to show how the Premier and Moore also struggled to convince their coalition colleagues (both frontbench and backbench) as to the merits of the appointment. It will be argued that the reason for this relates to the discussion about role conflict and norm commitment and notions of role price and attitudes towards reward and punishment in chapter two. As such, it builds on the work of Mancuso, which was also discussed in chapter two. In looking at the difficulties Greiner and Moore experienced in seeking to justify the appointment and, in the case of the Premier, his involvement therein, the chapter builds on the work of McGraw, Dyer and Bennett. It seeks to show how they struggled to control this issue for a number of reasons, including: (1) the balance of power in

the Parliament, which meant that the Government always had to be cognisant of the reactions of the non-aligned Independents; and (2) given this, the fact that ultimately they succumbed to pressure and released all documentation relating to the appointment process.

In line with the arguments of Chibnall and Saunders, it will be contended that one of the reasons why the Government failed to contain the issue had to do with the arenas in which it was played out and the audiences to which their accounts were directed. In this first stage there were two arenas and two main audiences. The first, and perhaps key, arena was the Parliament and within that the main audience to which Greiner and Moore were directing their justifications were the four Independents who held the balance of power. Given the political stakes involved, it was unlikely that the Opposition could be persuaded to accept the Government's accounts. The second arena was the public arena which focused on the media. There were multiple audiences involved here, although one, the media, was regarded as a conduit for the people of NSW. The role of the media is not discussed in this chapter, being reserved for later consideration.

There is another reason why Greiner and Moore could be expected to struggle when seeking to justify their behaviour which the chapter explores. Building on the work of Peters and Welch, Heidenheimer, Moodie, Johnston and the ICAC, this chapter will show how people can interpret or respond to behaviour in different ways. Often their reactions can appear to be politically inspired (as appeared to be the case with the Opposition); in other instances dictated by the individual's own moral compass (as per Hatton, Macdonald and Clover Moore). Because of this, the chapter will support Chibnall and Saunders' contention that an attempted justification which invokes a situational morality will struggle for acceptance if offered to the wrong audience or even presented within the wrong arena. However it will go beyond Chibnall and Saunders to argue that in a political context a situational morality argument may

even struggle to convince one's peers, given Mancuso's argument that there exists a wide range of attitudes amongst MPs.

The negotiation process

The Greiner Government first heard that Metherell was contemplating his political future in early February when he told his friend and former Liberal colleague, Brad Hazzard, of his dissatisfaction with politics and his desire to spend more time with his wife Louise, who was expecting their first child.¹ Metherell told Hazzard that he would consider leaving politics if he could find a suitable public service position, and identified a number of positions at the recently established Environment Protection Authority (EPA) in which he was interested. Hazzard advised Tim Moore, the minister responsible for the EPA and also a strong friend of Metherell's. Moore said that while the positions referred to were in the process of being filled, he was considering another "long term visionary type of position" which may be suitable.² Moore and Hazzard then advised Greiner of Metherell's comments.³

Greiner's initial response was one of disbelief.⁴ When asked about Metherell being appointed to the Public Service, Greiner was reported as having responded:

¹ The conversation between Hazzard and Metherell took place on February 7, 1992 in the carpark of the Waringah Shire Council after a breakfast meeting Hazzard and Metherell had both attended. See Hazzard statement to the ICAC, transcript of proceedings, May 11, 1992, 71-2; Metherell statement to ICAC, transcript of proceedings (hereinafter referred to as transcript), May 11, 1992, 98-9.

² It was similar to one which Moore had originally offered to Barry Jones, the federal president of the ALP. Jones had been unable to accept the position because of the requirement under s44(iv) of the Constitution which prevented Members of Parliament from holding another office of profit under the Crown. See Moore statement to ICAC, transcript, May 11, 1992, 53-4.

³ The Premier was informed of Metherell's intentions at a meeting on February 16. See transcript, May 11, 1992, 42; Greiner statement to ICAC, transcript, May 11, 1992, 83.

⁴ Greiner, second interview. The Premier also rejected the possibility of Metherell rejoining the Liberal Party. This had been previously canvassed and rejected. For example, the *SMH*, October 7, 1991, 1, had reported that the NSW president of the Liberal Party, Mr Peter King, was considering whether Metherell should be invited to rejoin the Party. The following day, however, it reported that the Party was deeply divided over whether Metherell should be invited back. It said that Metherell's greatest support came from Environment Minister and long-time friend Tim Moore, although other ministers were privately opposed to his being asked to return. Many held Metherell responsible for the Government's poor showing at the 1991 election. See *SMH*, October 8, 1991, 4. See also Greiner statement, transcript, May 11, 1992, 84.

If he pursues the matter, and he definitely wants to get out, then I don't see any obstacle to us considering him for a position. Provided it's a fair dinkum job, I have no problems with it.⁵

A number of other meetings followed, including a conciliatory meeting at the Premier's office between Greiner and Metherell.⁶ According to accounts of the meeting, Metherell not only told Greiner of his desire to leave politics, but also discussed a number of issues he wanted resolved.⁷ These issues were later identified during the ICAC hearing as Metherell's "non-negotiables".⁸ This first meeting was followed by a second and then a lunch at Parliament House between the Premier and Metherell.⁹ Given the adversarial nature of their relationship over the preceding six months, both men recognised the need for the appointment to be preceded by a period of public reconciliation between them. Their Parliament House luncheon was part of that process.

It was during the reconciliation process that arrangements for Metherell to be appointed to the public service were finalised. That process involved Moore seeking and gaining Greiner's approval to establish a fifth director's position at EPA, despite some opposition from the Authority's executive director, Dr Neil Shepherd.¹⁰ At that time Shepherd did not know it was Moore's intention to appoint Metherell to the position and not advertise it as required under the *Public Sector Management Act*.¹¹ When subsequently told of Moore's plan, Shepherd

⁵ Greiner, first interview.

⁶ This meeting, which has been dubbed the "glass of water" meeting, was the first between Greiner and Metherell since the latter's departure from the Party six months earlier.

⁷ Greiner, second interview.

⁸ These included: (1) his appointment to a meaningful position within senior ranks of the Public Service; (2) resolution of his legislative program; (3) the employment of his staff; and (4) reassurances from Greiner regarding his future if the position did not work out.

⁹ Brad Hazzard also attended each of these meetings and the lunch. See Hazzard, statement to ICAC, transcript, May 11, 1992, 80-1.

¹⁰ Moore had discussed the position with the chairman of the EPA, Professor John Niland, who had supported its creation. However Niland, like Shepherd, was not aware that Moore intended to appoint Metherell to the position without it being advertised. Shepherd did not believe the position was necessary at that time. See Moore statement, transcript, May 11, 1992, 61-5.

¹¹ Section 26 of the Act requires that SES positions be advertised unless the appointee is from within the Public Service.

offered to resign.¹² He also advised Moore that the appointment was not possible under the Act.¹³ A solution was however provided by the director general of the Premier's Department, Dick Humphry, who told Greiner and Moore at an early morning meeting on April 9 that Metherell could be appointed to one of two generic positions recently advertised¹⁴ within the Premier's Department and then be seconded to the EPA.¹⁵ The necessary paperwork was completed on April 10, with Metherell applying for and being appointed to the position of policy director within the Premier's Department.¹⁶ At the same meeting he received another letter, signed by Humphry, seconding him to the EPA. Metherell, accompanied by Moore, handed his letter of resignation to the Speaker of the Legislative Assembly, Mr Ken Rozzoli, at 4.40 pm on April 10.¹⁷ At 5.30 his appointment to the Senior Executive Service was ratified by the Governor at a specially convened Executive Council meeting.¹⁸ The chronology of events is outlined in figures 4.1(a) and (b) overleaf.

The Government's strategy

Greiner, Moore and Metherell were all aware that the appointment would be condemned, particularly by the Opposition. Nonetheless, they decided that Metherell's resignation and appointment should be announced at a press conference which they scheduled for a Saturday morning after Parliament had risen for the Easter recess.¹⁹ The Government's desire to manage the issue was also highlighted by the timing of the message sent out to media organisations informing them of

¹² Moore statement, transcript, May 11, 1992, 61.

¹³ *ibid*, 62.

¹⁴ The advertisement was in the *Sydney Morning Herald* on March 14. See transcript, May 11, 1992, 62.

¹⁵ Humphry, evidence to ICAC, transcript, 165-7.

¹⁶ Moore, statement, transcript, May 11, 1992, 64. See also Metherell statement, 128-9.

¹⁷ Moore statement, transcript, 64-5.

¹⁸ *ibid*, 65.

¹⁹ Senior political journalists tend to have the weekend off unless an important announcement has been scheduled in advance. Governments will often call press conferences or release information on a weekend which they know will not receive the same scrutiny because the journalists rostered on tend not to have the same level of political experience or issue knowledge. Also, the Saturday coincided with a by-election for former Prime Minister Bob Hawke's seat of Wills. It could be argued that the Government was hoping the Wills by-election would take media attention away from the Metherell resignation/appointment.

Figure 4.1(a): Chronology of key events leading up to the Press Conference

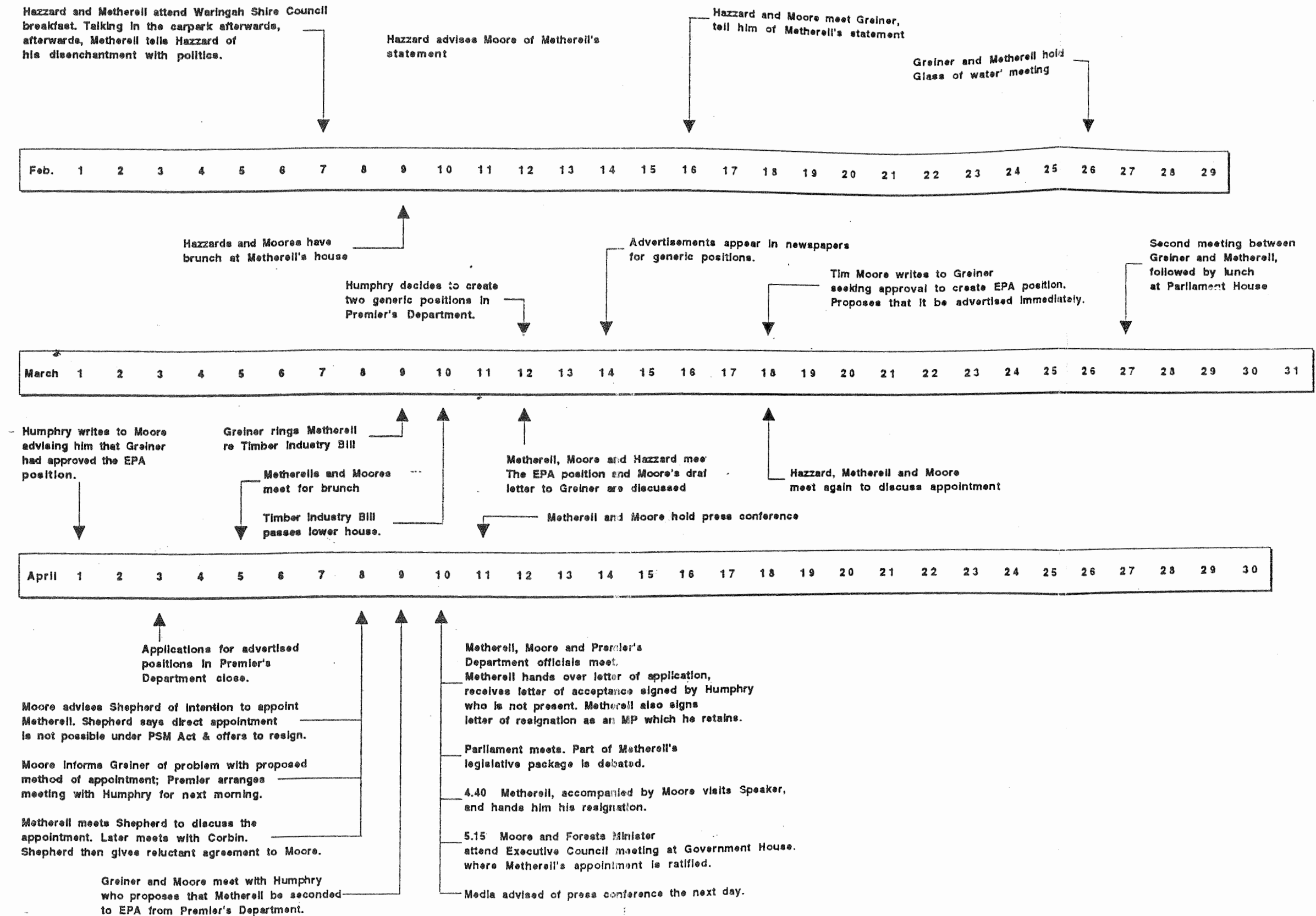
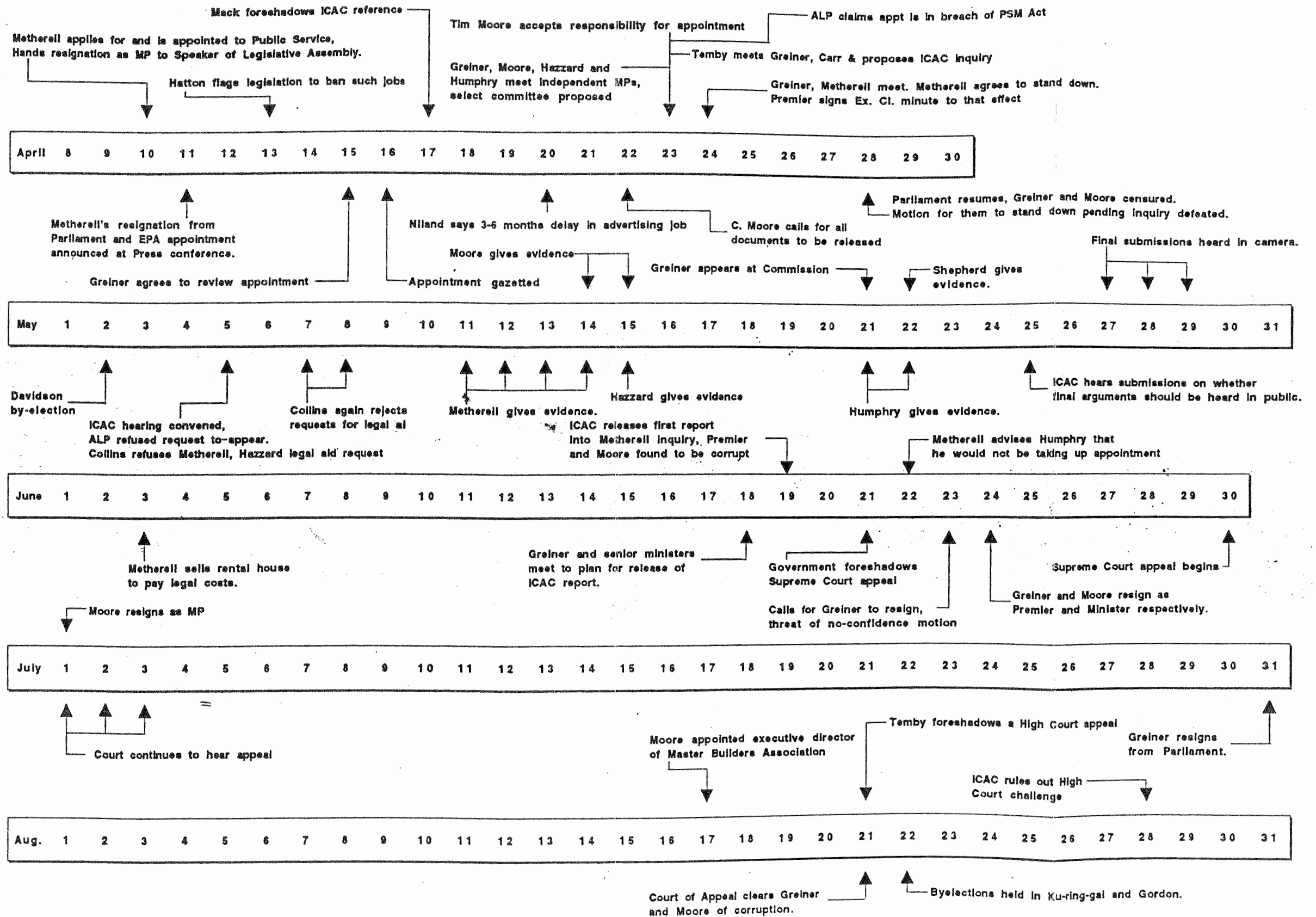


Figure 4.1(b) A Chronology of key events (April to August)



the press conference. They were not advised until 7 pm on the Friday night that it had been scheduled.²⁰

Moore's strategy was that he would front the media at the press conference and then disappear for a few days, hoping that his absence would cause the whole issue to die down.²¹ He advised Metherell similarly, suggesting that he take a holiday before starting his new job at the EPA.²² Metherell agreed, and he and his wife left for Vanuatu the next day.²³ Moore's approach, whilst understandable, meant that the Premier would be left to single handedly manage the political outrage that followed. As Greiner said later:

Tim said he had a conscious strategy of disappearing. I didn't have a conscious strategy and it is very difficult for the Premier to disappear. Tim consciously got out of the way and I just went about my business in my normal manner.²⁴

A similar tactic was adopted by Hazzard, who avoided the media after the furore had broken. Moore's decision, and to a lesser extent Hazzard's, highlighted the extent to which the Government had misread the depth of feeling generated by the appointment.²⁵ This was subsequently acknowledged by the Premier:

I didn't have the focus on planning or tactics. I assumed there would be some flak. And, rightly or wrongly, I had decided that winning back the seat was worth the flak. I was going to take the flak and people would say that this is another job for the boys or he's broken his promise about not having jobs-for-the-boys. And life would go on. I didn't have a sense of crisis about it or any sense of wanting to avoid the media because it didn't occur to me that it was a crisis in the sense of the level at which it eventuated.²⁶

²⁰ Metherell's statement indicated that there was concern about the media's response if their discussions were leaked. See transcript, 104, 117-20.

²¹ *ibid.*, 119.

²² Tim Moore, interview. Also Moore statement, transcript, 59.

²³ Transcript, 200.

²⁴ Greiner, second interview.

²⁵ This was highlighted by the number of letters to the editor published on this issue and the discussion which the appointment provoked on talk-back radio. Letters to the editor are discussed more fully in chapter 10.

²⁶ *ibid.*

Justifying the appointment

At the April 11 press conference and in accompanying media releases from Greiner and Moore, the Government outlined the three arguments it would rely on to justify the appointment. They were: (1) re-enfranchising the people of Davidson; (2) government stability; and (3) Metherell's qualifications for the job.²⁷ In relation to the first, the Government argued that when Metherell decided to move to the crossbenches in October 1991, he had disenfranchised the people who had elected him as a Liberal MP some five months earlier. This argument was particularly evident in Greiner's press release which mentioned Metherell's earlier 'defection'.²⁸ Moore's media release was less critical of Metherell,²⁹ although it did concede that "the electors of Davidson would now be able to obtain the result they voted for in the last State election - representation for them in Parliament by a Liberal member."³⁰ It was an argument based on fairness. In particular, the Government argued that because Metherell had been elected as a member of the Liberal Party he had a moral obligation to the people of Davidson and the Government, to either remain a Liberal MP or to resign from Parliament and recontest his seat as an Independent.³¹

The second theme was the need for stability of government. As Greiner explained: "It was a knife edge government and I wasn't really temperamentally suited to being a knife edge Premier."³² He also conceded that he had been influenced by the uncertainty surrounding the

²⁷ This was evident in Tim Moore's press release which announced the appointment, and one issued by Greiner to welcome it. Both were dated April 11. See also Greiner press conference, April 14, 1992.

²⁸ Greiner, media release, April 11, 1992. The heading on Greiner's media release "Dr Terry Metherell's Decision," provides an interesting insight into the Government's strategy.

²⁹ Possibly because it also contained comments from Metherell.

³⁰ Tim Moore, media release, April 11, 1992.

³¹ History is replete with examples of MPs who have left an incumbent government to sit on the crossbenches. For example, the present federal government has seen two backbenchers - Paul Zammit and John Bradford - defect. However in neither instance did their move to the crossbenches threaten the Government's hold on office. This is the crux of the Government's argument - that Metherell was elected as a member of the Government, not as an MP who could bring it down.

³² Greiner, second interview.

three other Liberal seats and a desire to continue with the Government's legislative program, which he said had been "adversely affected" by Metherell's defection.³³ Throughout this first stage, Greiner often pointed to the need for the Government to be able to get on with the job and he detailed its economic record during its first term in office as evidence of the results that could be achieved under a majority government.³⁴

Despite Metherell's political baggage, the Government lauded his credentials and suitability for the position. Moore described Metherell's credentials as "impeccable",³⁵ with Greiner saying that he was "overwhelmingly qualified for the position".³⁶ Perhaps surprisingly, given public attitudes towards Metherell, Moore highlighted their friendship, pointing out how they held similar views on environmental matters and thus would be able to work together.³⁷ Significantly, he also argued that the appointment was in line with the Government's policy of "appointing people of merit, regardless of their political views".³⁸ In a pre-emptive move, Moore listed a number of so-called "similar" appointments involving Labor figures he had made in his capacity as minister.³⁹ Greiner likewise focused on Labor appointments, including a number sanctioned by the then Opposition leader, Bob Carr, and several involving the Opposition leader in the upper house, Michael Egan.⁴⁰

³³ Greiner, media release, April 11, 1992.

³⁴ *ibid.*

³⁵ Tim Moore, media release, April 11, 1992.

³⁶ Greiner, media release, April 11, 1992.

³⁷ In fact he listed a number of their joint environmental achievements. These included the State's first environmental education curriculum statement in schools, the first environmental education plan. He said that from the crossbenches, Metherell had recently introduced a number of amendments which strengthened the EPA. And he acknowledged that when both men had been in Cabinet together, Dr Metherell had been his strongest supporter for the creation of environmental trusts.

³⁸ Tim Moore, press release, April 11, 1992.

³⁹ *ibid.* These included former NSW Labor Premier Neville Wran to the Centennial Park Trust, former Labor Minister George Paciullo as a transport consultant, and the re-appointment of Mrs Katherine Anderson to the Zoo Board, former Labor Minister Peter Cox as chairman of the Bicentennial Trust Board and trade union leader Ernie Ecob to the Bicentennial Trust Board.

⁴⁰ Egan was appointed to the Maritime Services Board and as an adviser to Barrie Unsworth, at the time a minister but later to become NSW Premier, when he lost his Upper House seat of Cronulla. See A. Larriera and E. Jurman, "Quick-fix solution may quickly be fixed," *SMH*, April 22, 1992, 4. Carr had appointed Peter Fitzgerald, a member of his ministerial staff, to the Sydney Cove Development Authority.

By trying to draw parallels with earlier Labor appointments, the Government appeared to be applying a situational morality along the lines outlined by Chibnall and Saunders and Johnston. Both Greiner and Moore argued that it was in accordance with the practice which countless other governments had adopted. However, in taking this approach, the Government did not consider the attitudes of the non-aligned Independents who held the balance of power. That is, they did not appear to contemplate that there might be differing views amongst members of the political elite, which were perhaps influenced in part by the prospect of favourable political outcomes (as appeared to be the case with the Labor Opposition). Nor did the Government appear to fully appreciate the strength of community expectations, namely the fact that, rightly or wrongly, the people of NSW believed that Greiner had eschewed jobs-for-the-boys, as the appointment was labelled by the opposition, and that he had promised to introduce higher standards of parliamentary conduct.

This was the fundamental weakness in the Government's early attempts at justifying the Metherell appointment. Greiner failed to counter the perception that he would not countenance jobs-for-the-boys. Nor did he adequately explain the difference between what he called 'political appointments' and 'jobs-for-the-boys' per se. According to Greiner, the Metherell appointment was a political appointment. That is, whilst it was made for political reasons, it could be justified because Metherell was qualified for the job. The jobs-for-the-boys, of which he accused Labor, on the other hand, involved people who were not qualified for the positions to which they were appointed.

A failure to seek advice

Greiner's failure to anticipate the likely reaction to the appointment was also highlighted by his and Moore's decision not to consult widely with colleagues or staff before it was finalised or even announced. Cabinet was not advised until the morning of the press conference when Greiner and

Moore rang their ministerial colleagues to tell them.⁴¹ According to the Premier, the initial response of ministers had been "overwhelmingly positive" and there "was certainly nobody who said the world would end or anything else".⁴² However he conceded that initially they were not provided with the detail: "I simply said, I have appointed Metherell to a job; he's going to resign today."⁴³

Only a small number of people actually knew about, or were involved in, the negotiations. They included Greiner, Tim Moore, Metherell, Hazzard, Shepherd and Humphry.⁴⁴ Not even Gary Sturgess, the director general of the Cabinet Office, and a long time Greiner strategist, or Ken Hooper, the Premier's chief of staff, knew of the discussions. According to Sturgess, he and Hooper realised that "something was going on" on the Friday morning, April 10.⁴⁵ Sturgess found out about the appointment at 4pm that afternoon.⁴⁶ Hooper did not find out until the next day.

According to Sturgess, the Premier's decision not to consult with his staff was not especially surprising. He said that Greiner knew what advice he would have received and he did not want that advice.⁴⁷ Hooper later defended Greiner's decision not to discuss the appointment with his staff or colleagues. In a *DTM* article he wrote:

There are thousands of so-called experts ... who will say that if Nick had consulted his advisers (me included) he would not have made the error. They're wrong. Because the truth is that at the time Nick Greiner was torn between advice from some Cabinet colleagues to

⁴¹ Greiner said that they divided the Liberal ministers amongst them. The Premier said he could recall ringing Collins, Baird and the National Party leader, Wal Murray. Greiner, second interview.

⁴² Greiner, second interview. In fact Greiner said that Collins, the deputy Liberal leader, who was soon to become a harsh critic of the appointment, had been particularly enthusiastic and that he had called out and told his wife "what good news it was".

⁴³ *ibid.*

⁴⁴ Greiner's wife, Kathryn, and Metherell's wife, Louise, also knew about the negotiations. Shepherd and Humphry did not become involved until shortly before Metherell's resignation and subsequent appointment were finalised. Other people became aware of the appointment before its appointment, including a small number of Moore's staff and the Governor.

⁴⁵ Interview, Gary Sturgess, August 03, 1993.

⁴⁶ This was 40 minutes before Metherell handed his resignation to the Speaker of the House, Ken Rozzoli. According to Sturgess, Humphry had been given approval to organise an executive council meeting "around me", that is without his knowledge.

⁴⁷ Sturgess interview.

dump his most senior advisers and loyalty to the people who had guided his rise to power. The 'nervous Nellies' in Cabinet saw people like the director general of the Cabinet Office, Gary Sturgess, and myself as having too much power and influence ... and largely responsible for anything which went wrong. Others were eyeing the premiership, waiting for Nick to make the mistake they were certain he would make if they could undermine our influence. Little wonder in the circumstances Nick chose to trust no-one completely ... and paid a fearful price.⁴⁸

Hooper's comments are important, because they focus on one of the major criticisms of the appointment - and more particularly of Greiner - both from within the government and outside. That had to do with Greiner's lack of political acumen. When Greiner was elected Premier, part of his appeal to voters was his image as a non politician. That is, Greiner promoted himself as an economic manager and a leader who would not become involved in the horse-trading which characterised politics. Following the Government's poor showing in the 1991 election, Greiner had been advised to become more political. It could perhaps be argued that the Metherell appointment was a response on his part to such criticisms. Initially he believed the appointment would be applauded as a politically adroit manoeuvre.⁴⁹ Defending the appointment, he said: "... anyone in my position, in the particular political situation in NSW, would have made the same decision".⁵⁰

The initial public reaction of Greiner's colleagues was mixed, and confirms Mancuso's observations from Chapter two. Whilst the Deputy Premier and National Party leader, Wal Murray, and the Government Leader in the Legislative Council, Ted Pickering, both issued media releases⁵¹ supporting Greiner, a number of backbenchers were openly critical of the appointment. Peter Cochran, a National Party backbencher, said: "[t]raitors in times of war are not treated as kindly."⁵² Cochran even

⁴⁸ *Telegraph Mirror*, November 21, 1992.

⁴⁹ Greiner, first interview.

⁵⁰ Greiner, press conference, April 14, 1992.

⁵¹ Wal Murray, media release, "On Metherell resignation," April 13, 1992.; Ted Pickering, media release, "Pickering supports Tim Moore," April 27, 1992.

⁵² M. Coultan, "Parlt may scuttle Metherell job," *SMH*, April 13, 1992, 1.

called for Moore to be sacked as Minister for the Environment.⁵³ His comments, and those of Liberal backbencher Alby Schultz,⁵⁴ reflected the ill-feeling in the Government towards Metherell. Government MPs were not only critical of Metherell for defecting, but many believed that his handling of the education portfolio had been the reason why the Government lost its majority at the previous election.

As the crisis escalated, speculation mounted about Cabinet discontent as well, with some suggestion that Greiner's leadership was at risk. Greiner's deputy, Peter Collins, added fuel to the fire when he publicly said there was a need for the issue to be discussed in Cabinet and resolved quickly.⁵⁵ Collins' comments added to the perception of a government under siege. In some respects this is an illustration of role conflict at work. On the one hand there was an expectation that the Premier should do what he could to shore up the Government's position, but on the other there were clearly limits to the lengths he could go in achieving that end (at least in the minds of some MPs). These included Cochran and Schultz who did not believe the potential political benefits could be justified given that the beneficiary was Metherell.

Thus there was one immediate problem for Greiner – a perception that not only was the appointment made without the knowledge of other members of the Government, including senior ministers, but also that the Coalition was not presenting a united front in the face of the crisis. In this first period, however, Greiner's problems with his own party were manageable compared with those created by his political opponents. Predictably, the Opposition and the crossbenches were critical of the appointment. So too were the chairman of the EPA Board, Professor John Niland, the federal Environment Minister Ros Kelly, the director of the Australian Conservation Foundation (ACF), Philip Toyne, and the

⁵³ M. Coultan, "Greiner battles to survive crisis," *SMH*, April 22, 1992, 1. Liberal Party condemnation of Moore did not stop there, with members of the joint committees in his electorate of Gordon proposing a censure motion against him. The *SMH* reported that Moore was considered too left wing for sections of the Party. See Luis M. Garcia, "Minister's own Liberal branch may censure him," *SMH*, April 29, 1992, 6.

⁵⁴ M. Coultan, "Parlt may scuttle Metherell job," *SMH*, April 13, 1992, 1.

⁵⁵ M. Coultan, "Greiner battles to survive crisis," *SMH*, April 22, 1992, 1.

secretary of the Public Service Association (PSA), Allan Gibson.⁵⁶ Niland and Toyne argued that the appointment would undermine the credibility of the EPA.⁵⁷ Gibson said that the union would seek legal advice on whether the appointment could be challenged.⁵⁸

The ALP's early strategy was multi-faceted. On the one hand it seized on the monetary benefits Metherell would receive and the cost to the taxpayer of his appointment.⁵⁹ It also countered Greiner's situational morality claim that the appointment was no different to other jobs-for-the-boys for which Labor had been responsible, by arguing that in none of the cases identified by the Premier had the appointment changed the potential balance of power in the parliament.⁶⁰ Also, it said that the appointments identified by Greiner as Labor jobs-for-the-boys were within the preserve of executive government in that they involved statutory positions, not public service appointments which were governed by principles of fairness.⁶¹

⁵⁶ See, for example, M. Coultan, "Parlt may scuttle Metherell job," *SMH*, April 13, 1992, 1; A. Larriera, "Anger on board over the new job," *SMH*, April 14, 1992, 2; N. Richardson, "Libs lure candidates to replace Metherell," *Australian*, April 13, 1992, 3.

⁵⁷ Larriera, "Anger on board," *SMH*, April 14, 1992, 2.

⁵⁸ A. Larriera and E. Jurman, "Opponents threaten action over 'illegal' deal," *SMH*, April 15, 1992, 4. The PSA later abandoned this approach when it was revealed that s 27 (3) of the *PSM Act* precluded the right of a legal appeal against such appointments. The fact that the Act did not allow for any form of legal appeal undermined the Government's attempts to argue that the appointment process was above board. See A. Larriera, "Govt accused of breaking own laws," *SMH*, April 16, 1992, 4.

⁵⁹ Egan initially costed the appointment at \$600,000. This included \$200,000 for the by-election; \$100,000 for Metherell's salary; and a superannuation pay-out of \$44,000 a year for life or a lump sum of \$330,000 and an annual pension of \$11,000. (Media release, April 12, 1992. The inclusion of the superannuation figure showed that the Opposition was clearly seeking to artificially boost the so-called 'costs' of the appointment. This was highlighted by later claims. In a media release on April 16, Egan claimed that Metherell would be able to claim the cost of his holiday in Vanuatu as a tax deduction under the terms of his new contract. He also pointed to other fringe benefits Metherell could be entitled to, including a nanny or child care expenses, a private motor vehicle, private school fees and home mortgage repayments. He said the fringe benefits would be worth \$10,000 a year after tax to Metherell (See press release, April 22, 1992). By early May Egan had claimed the cost of the Metherell affair had reached almost \$2.3 million. Although this involved some creative double accounting. Egan had included the costs of both the EPA and Premier's Department jobs (\$550,000 apiece over the five years of the contract). The superannuation payout had also been boosted to \$440,000. In the second statement he had included the projected costs of publicly funded legal representation. See media release, May 6, 1992.

⁶⁰ M. Egan, speaking on ABC's *7.30 Report*, April 20, 1992; N. Richardson, "Libs used backdated work law, says ALP," *Australian*, April 15, 1992, 4.

⁶¹ *ibid.*

Opponents move to annul appointment

The early response of MPs was that Metherell should be dismissed without compensation or, alternatively, that if compensation were to be paid, it should be paid by the Liberal Party rather than taxpayers of NSW.⁶² MPs went further, however. Within 24 hours of the Moore/Metherell press conference, the Opposition had announced that when Parliament resumed on April 28 it would introduce retrospective legislation cancelling the appointment, denying Metherell any compensation, and preventing him from being appointed to another public sector position until after the next general election unless the position was advertised and he was selected on merit.⁶³ Hatton also foreshadowed legislation to prevent such appointments in the future.⁶⁴ The Opposition proposal received a positive response from the Independents and minor parties, although Hatton⁶⁵ and the Rev. Fred Nile⁶⁶ expressed concern at the question of retrospectivity.⁶⁷

Greiner rejected the call for retrospective legislation, arguing that the Government's contract with Metherell was legally binding. At a press conference called to defuse the building furore, he said:

[T]he notion that retrospective breaking of a contractual agreement, legislating away someone's legal rights, that that is somehow a lesser

⁶² The first solution was proposed by the Opposition, the second by Clover Moore, one of three non-aligned Independents who held the balance of power.

⁶³ In fact, the Leader of the Opposition in the Legislative Council, Michael Egan, circulated a first draft of his proposed *Public Sector Management (Integrity of Appointment) Bill 1992* on April 15, just five days after the announcement of Metherell's appointment to the EPA. Michael Egan, letter to John Hatton, April 15, 1992. In the two week parliamentary adjournment following on from Metherell's resignation, Hatton had drafted his own legislation - *The Constitution (Crimes) Bargaining for Public Office Amendment Bill 1992* which he proposed to introduce in an attempt to prevent such appointments in the future. He said the clear objective of the legislation was to "prevent jobs-for-the-boys and pay-offs", while not preventing members of Parliament who had previously been public servants from resuming their careers upon leaving Parliament.

⁶⁴ He proposed a two-year waiting period for MPs who wanted to take up a position in the public service. See media release, April 13, 1992.

⁶⁵ *ibid.*

⁶⁶ Speaking on ABC Radio's *AM*, Nile described the legislation as 'draconian'. April 16, 1992.

⁶⁷ This was also rejected by the fourth Independent, Tony Windsor, during the parliamentary debate on the censure motion.

evil than a political appointment of someone to a job which he or she can clearly do, I find an amazing point of view.⁶⁸

The Premier warned that such an approach could undermine the credibility of Parliament.⁶⁹ He also warned that according to legal advice, the matter could be decided in the courts if Parliament did pass the proposed bill.⁷⁰

In a further attempt to contain the situation, Greiner promised to introduce his own legislation which provided for a 6 month cooling-off period between the time a Member of Parliament resigned his or her seat and when they could become eligible to apply for a public service position.⁷¹ Tim Moore also foreshadowed two Government amendments to the ALP's proposed legislation.⁷² The first would prevent "any former Member voting on the Bill who had directly intervened for political purposes in Public Service selection procedures, to arrange the appointment of a political supporter".⁷³ The second proposed amendment stipulated that any politician who had been appointed to a paid Government position after being defeated at an election be barred from voting.⁷⁴

Impropriety alleged

The ALP continued its attack, arguing that the appointment could have breached the Government's own PSM Act, which laid down the guidelines for appointment to the Senior Executive Service (SES) and was one of the key pieces of legislation Greiner had introduced soon after

⁶⁸ Greiner, press conference, April 14, 1992.

⁶⁹ *ibid.*

⁷⁰ Greiner, on Alan Jones, 2UE, April 16, 1992

⁷¹ J. Ferrari, "Metherell sure of lucrative PS job," *Australian*, April 20, 1992, 1,5.

⁷² L. M. Garcia, "Moore breaks silence to attack Carr," *SMH*, April 24, 1992, 6.

⁷³ This was aimed directly at Bob Carr, who had appointed Peter Fitzgerald, a member of his ministerial staff, to the Sydney Cove Development Authority. See Tim Moore, media release, April 23, 1992.

⁷⁴ *ibid.* This amendment was intended to prevent the Opposition Leader in the Upper House, Michael Egan, and Peter Anderson, the Labor Member for Liverpool, from voting on the Bill. Egan who was a trenchant critic of the Metherell appointment had himself benefited on three occasions from such ministerial largesse. Anderson had been appointed to Ron Mulock's staff after being defeated at the 1976 election.

winning office. Egan claimed the Government's actions ignored all the proper processes of appointment to the Public Service, including advertising the position and providing an independent selection panel.⁷⁵ The Government denied these claims, with Greiner saying he had told Tim Moore he would only sanction the appointment if: (1) it was a legal appointment; (2) it was to a position for which Metherell was qualified; (3) no additional money was required to fund it; and (4) the Government was morally entitled to the seat.⁷⁶ Greiner also played down his role in the appointment, describing it as "minor".⁷⁷ However he did agree that "the buck stops with me", an acknowledgement of his responsibility as Premier.⁷⁸

Whilst clearly reluctant to overturn the appointment, during a meeting with Nile on April 15 Greiner did agreed to review it with the possibility of changes "around the edges".⁷⁹ Nile had advised Greiner to either advertise the job and have Metherell face a selection panel along with all other applicants, or alternatively appoint him to a ministerial staff position which was not governed by the terms of the PSM Act.⁸⁰ Both these options had previously been ruled out by Tim Moore who believed that, given his background, Metherell's application would not be judged on its merits or if it were that the selection panel would have been accused of favouritism.⁸¹ Following the meeting, Greiner also indicated some support for a resolution of the EPA board that Metherell would be placed on three months probation.⁸²

Despite wrestling with a moral dilemma – the belief that the Government was obliged to honour its contract with Metherell – on April 19 Greiner capitulated. Amid increasing speculation that the

⁷⁵ A. Larriera and E. Jurman, "Opponents threaten action over 'illegal' deal," *SMH*, April 15, 1992, 4;

⁷⁶ Greiner, speaking on ABC's *7.30 Report*, April 21, 1992.

⁷⁷ *ibid.*

⁷⁸ Greiner, press conference, April 24, 1992.

⁷⁹ *ibid.*

⁸⁰ Anne Connolly, "Greiner agrees to review Metherell appointment," *Australian*, April 16, 1992, 2; M. Coultan, "Premier to rethink Metherell contract," *SMH*, April 17, 1992, 3.

⁸¹ Moore, transcript, 554.

⁸² Greiner, press conference, April 15, 1992.

Opposition and the Independents would introduce either a censure motion or a no-confidence motion when Parliament resumed on April 28, and knowing that the two Nile votes were essential if the Government was to defeat the Opposition's proposed legislation to rescind the appointment in the upper house, Greiner announced that the EPA position would be advertised.⁸³ He said that if Metherell wanted the position he would have to apply along with the other candidates on his merits.⁸⁴ Whilst this decision was applauded in some quarters, and guaranteed him the Nile votes in the Legislative Council, the Premier was roundly criticised when it was realised that even if he lost the EPA position, Metherell would be entitled to retain his position within the Premier's Department.⁸⁵

The Government's vulnerability, and its poor handling of the issue, was further exposed on April 20 when David Jones advised journalists that Metherell had in fact been appointed to the position after he had responded to an advertisement and been interviewed by Humphry.⁸⁶ Jones' comment, which was apparently made without the Premier's knowledge, was contrary to the stance both Greiner and Moore had previously taken, namely that the appointment was political and that Metherell could not have been appointed by normal means. Following Jones' statement, Greiner conceded that the Government had mishandled the process:

[T]he sin if you like is in the failure to advertise the basic position. We are not seeking to rely on this, because if we were we would have trotted it out nine days ago and said 'look, we advertised this'. We are not pretending for a moment.⁸⁷

Rather than quell the furore, Jones' comments further angered the Independents and the Opposition. Hatton summed up the collective concerns when he said: "We cannot sort out who's telling the truth and

⁸³ R. Macey, "Metherell still has \$110,000 job," *SMH*, April 20, 1992, 1.

⁸⁴ Greiner, *7.30 Report*, April 21, 1992.

⁸⁵ Macey, "Metherell still has \$110,000 job.

⁸⁶ A. Larriera and E. Jurman, "Metherell tried for job while an MP," *SMH*, April 21, 1992, 1.

⁸⁷ Greiner, interview, *ABC 7.30 Report*, April 21, 1992.

who's telling lies and half-truths and prevarication. It's quite an extraordinary situation."⁸⁸ The non-aligned Independents continued to publicly canvas the possibility of a no-confidence or censure motion whilst the Government refused to release details of the appointment. Hatton, Macdonald and Clover Moore warned that evidence of maladministration or corruption could see them support a censure motion against Greiner, Moore or even the Government as a whole.⁸⁹ This was in line with the wording of the Memorandum of Understanding signed by the non-aligned Independents and Greiner the previous November (see Appendix A).

Ten days after the press conference announcing the appointment, Greiner agreed to a meeting with Clover Moore and Macdonald.⁹⁰ He also acceded to a written demand from Clover Moore that information relating to the appointment be released to the Independents at the meeting.⁹¹ Clover Moore, in a press release issued later that day, said that the Premier's response to her request for the information would determine what further action she might take.⁹² Her wish to have all the facts out in the public arena was highlighted the following day when, after her meeting with the Premier, she released the information received to the media.⁹³

⁸⁸ Hatton interview, Radio 2GB, April 22, 1992.

⁸⁹ J. Ferrari, "Greiner's future on line over crisis ultimatum," *Australian*, April 23, 1.

⁹⁰ On the Government's side, the meeting was attended by Greiner, Tim Moore, Brad Hazzard and a number of advisers. Clover Moore and Peter Macdonald, along with a number of advisers attended on behalf of the Independents. John Hatton, however, refused to attend. He said that he would not discuss the matter with either Greiner or Carr before Parliament resumed.

⁹¹ Clover Moore asked for all documents relating to the SES positions within the Premier's Department advertised in the *SMH* and *Telegraph Mirror* on March 14 and again on April 21; Metherell's original application for the position; all documents, including correspondence, relating to his application; the originals of all other applications received in response to the advertisement; all documents relating to these applications; a complete inventory of the times, dates and places of all meetings and telephone conversations between Tim Moore and Metherell and between Greiner and Metherell between January 1 and April 21, 1992. See letter, Clover Moore to Premier, April 22, 1992. On the same day the Opposition Leader, Bob Carr, wrote to Humphry in similar terms, although he was more specific in terms of Metherell's application, seeking "written confirmation that he applied in direct response to an advertisement placed on March 14", all notes and records of his [Humphry's] interview with Metherell and the job number of the position for which he had applied and to which he was appointed. Carr had warned that if the information were not forthcoming, the Opposition would call Humphry and Metherell before the bar of the Parliament to explain their involvement in the appointment process. See letter, Bob Carr to Dick Humphry, April 22, 1992.

⁹² Clover Moore, media release, April 22, 1992.

⁹³ The documentation included a copy of the March 18 letter from Minister Moore to Greiner, seeking approval for the establishment of a fifth executive director's position within the EPA

By releasing this information, the Government was clearly playing into the hands of the Opposition and the Independents. As Dyer, McGraw, and Bennett⁹⁴ have argued, individuals or parties who control the information flow tend to have the upper hand in crisis management situations. Without the hard evidence, opponents are forced to rely on speculation about motive. But once key information is released, a situation can change dramatically. That was the case with the Metherell affair after the Government succumbed to the separate demands of Clover Moore and Bob Carr. The Labor Party said the documents reinforced its earlier claims that the appointment was improper and that Metherell had been favoured over other applicants for the Premier's Department positions advertised on March 14. The Independents and the Opposition all focused on the fact that Metherell had applied whilst he was still a Member of Parliament and that he had been appointed on the same day, without interview, on the recommendation of Humphry, despite there being a number of other candidates who had been earmarked as suitable for the Premier's Department positions.⁹⁵ They also highlighted the fact that Metherell's application was dated a week after the designated closing date for the positions. Thus whilst the Government had been seeking to justify the appointment on the grounds of fairness (the re-establishment of the political status quo) and

and copies of a number of letters dated April 10. These included a letter from Humphry to Minister Moore indicating that he had received an application from Dr Metherell and that in his [Humphry's] opinion Metherell was "highly qualified to carry out duties associated with environmental protection". The letter also contained a rather interesting request from Humphry, given the nature of the meeting earlier that day with Greiner at which time he was asked to resolve the problems created by the *Public Sector Management Act*. The letter contained the phrase: "Recently I advised you of approval of a level 4 SES position within your portfolio and, with your concurrence, propose seconding Dr Metherell to that position." The sentence gives the impression that Humphry played a far more significant role in Metherell's appointment than ICAC would later find. A letter from Humphry to Metherell, advising him that he had been appointed to the position, and a letter from Humphry to Shepherd, indicating that Metherell had been appointed to the SES and that "the Minister for the Environment has agreed to his secondment to your agency", were also released. Whilst she did not receive a chronology events, she was provided with a copy of a letter from Humphry to Greiner, dated April 22 which had, at the Premier's request, detailed Humphry's involvement in the appointment. Humphry declined to release the chronology once the ICAC inquiry had been released, despite earlier promising to do so, arguing that it would be sub judice.

⁹⁴ Dyer, "Windows of Opportunity in Organisational Crisis Events;" McGraw, "Avoiding Blame," and Bennett, "The Paradox of Public Discourse."

⁹⁵ The Premier's Department had in fact identified three other applicants as suitable for positions. See Humphry, statement to ICAC, transcript of evidence, 163.

Metherell's qualifications for the job, the release of the information surrounding the process of appointment gave credence to the Opposition's claims that he had received preferential treatment.

ALP raises spectre of corruption

Following the release of this information, the Labor Party claimed it had preliminary legal advice which suggested that Metherell's appointment "fits the legal definition of corruption".⁹⁶ Carr argued that the Government and Dr Metherell would be guilty of corrupt conduct if it was established that he had been induced to resign his seat through the offer of the job and his behaviour in office had led him to "act contrary to known rules of honesty and integrity".⁹⁷ He also said that according to the ALP's legal advice, it would be a criminal offence if Metherell had changed his vote because of the job offer.⁹⁸ In particular the Opposition and Independents expressed concern at the possibility Metherell had changed his vote on the *Timber Industry (Interim Protection) Bill* because of negotiations over the EPA position.⁹⁹ This was the first occasion on which the possibility of corruption had been seriously canvassed. In so doing, the Opposition had taken the issue out of the realm of Peters' and Welch's 'just politics' to one involving questions of illegality.

Greiner and Tim Moore were again forced to respond to the allegations, denying that there had been any impropriety on their part. Moore, who had been studiously avoiding the media, called a press conference at which he accepted responsibility for the appointment, but rejected any suggestion of impropriety or immorality:

⁹⁶ J. Cooper, "Bribe query on Metherell vote." *Australian*, April 24, 1992, 1.

⁹⁷ Carr was focusing on the wording of the ICAC Act, even though the ICAC inquiry had not been formalised at that stage. See also the media release by the Opposition spokesman on Industrial Relations, Jeff Shaw QC, April 23, 1992.

⁹⁸ Cooper, "Bribe query on Metherell vote."

⁹⁹ According to timber industry sources and environment groups, Metherell had been proposing amendments to the legislation and that despite telling environment and timber industry groups two hours before the vote that his position had not changed, he ultimately voted with the Government against his own amendments. The proximity of that vote to negotiations over the EPA appointment caused people to question why he had changed his mind. See N. Richardson, "ICAC must examine Metherell timber vote," *Australian*, April 27, 1992, 1; J. Ferrari and N. Richardson, "Amendment support dropped at 11th hour," *Australian*, April 25-26, 1992, 4.

I'm not admitting there was any impropriety in what occurred at all. I don't consider there was from my point of view anything immoral. Certainly I am admitting I made some very bad judgments as to what the consequences would be ... but I had clearly not anticipated the reaction that would come from the public to the appointment.¹⁰⁰

Whilst Moore confirmed that the discussions about the job had begun on February 7 and had not been concluded until the day Dr Metherell resigned, he nonetheless argued:

The question of whether Dr Metherell was going to be appointed to any positions outside Parliament was not discussed in the context of the Bill or any other legislation that the Government was carrying on the floor of the House.¹⁰¹

Setting up an inquiry

The Opposition raised the spectre of corruption on the day Greiner and Moore met with Clover Moore and Macdonald.¹⁰² Greiner's approach to the meeting appeared somewhat conciliatory, with the Premier indicating that he was "in their hands".¹⁰³ The Independents accepted Greiner's offer that he would set up a parliamentary select committee,¹⁰⁴ believing this would enable the matter to be dealt with expeditiously.¹⁰⁵ However

¹⁰⁰ J. Ferrari, "Sorry Moore admits making bad judgments," *Australian*, April 24, 1992, 1.

¹⁰¹ Tim Moore, quoted by J. Cooper, "Bribe query on Metherell vote," *Australian*, April 24, 1992, 1.

¹⁰² This was the meeting at which Clover Moore obtained the detail surrounding the appointment process.

¹⁰³ Although Greiner's demeanour was questioned in a memo covering the meeting prepared by a staffer employed by one of the Independents. She suggested that Greiner had told the Independents: "we are in your hands". See memo to Peter Macdonald from Anne Jones, nd.

¹⁰⁴ The select committee was one of a number of options which had been canvassed during the week. Others included the possibility of a reference to ICAC and a judicial inquiry. The select committee proposal was widely supported by the other small political groups, although there was some debate over its composition. The ALP, however, originally opposed the setting up of a select committee, preferring instead a full parliamentary debate. The shadow attorney general, Paul Whelan, described the Government's proposal as a "transparent stalling tactic". He said that the Government could use the committee to stall proper debate, and argued that select committee recommendations did not carry the same weight as a resolution carried by Parliament. However Whelan said that if a select committee was to be established, Hatton should be chairman, but with a casting vote to prevent the inquiry becoming bogged down. See Whelan, media release, April 23, 1992.

¹⁰⁵ In a follow-up letter to the Premier the next day in which she proposed the terms of reference for a select committee, Moore argued with evidence received over two days (April 29 and 30)

this option was short-lived. On April 23, ICAC head Ian Temby approached Greiner and Carr, suggesting that the Commission conduct the inquiry. Both agreed, although Greiner suggested that the inquiry be established through a parliamentary reference, rather than being self-initiated by the ICAC.¹⁰⁶ He said that after discussing Temby's proposal with Sturgess: "[w]e both agreed that if it was going to happen it was better that the Government refer it. There is no practical difference, except in appearance if you like," he said.¹⁰⁷ Greiner and Metherell both welcomed the inquiry.¹⁰⁸

Temby proposed three terms of reference which were taken from s13(2) (a) (b) and (c) of the *Independent Commission Against Corruption Act* 1988. They were:

(a) Whether any corrupt conduct has occurred, is occurring or is about to occur; and

(b) Whether any laws governing any public authority or public official need to be changed for the purpose of reducing the likelihood of the occurrence of corrupt conduct; and

(c) Whether any methods of work, practices or procedures of any public authority or public official did or could allow, encourage or cause the occurrence of corrupt conduct.¹⁰⁹

The Government proposed a fourth which was ultimately adopted by the Parliament and included in the reference to ICAC. It was that:

with an interim report to be presented to Parliament on May 1, before the Davidson by-election on May 2. The proposed terms of reference were: to inquire into and report on all the circumstances relating to (1) the resignation of Metherell as Member for Davidson; (2) his appointment to the SES; and (3) the relationship between his resignation as Member for Davidson and his subsequent appointment to the SES. She proposed that seven witnesses be called - Greiner, Metherell, Tim Moore, Hazzard, Humphry, Niland and Shepherd. See letter, Clover Moore to Greiner, April 24, 1992.

¹⁰⁶ Under the ICAC Act, Temby was not obliged to gain the concurrence of the Premier to conduct an inquiry; he was empowered to conduct an inquiry at his own initiative. Nonetheless, perhaps realising the potential political fall-out of such an inquiry, he approached both Greiner and Carr seeking support for his proposal.

¹⁰⁷ Greiner, second interview. The Government is able to refer matters to the ICAC under s 73 of the ICAC Act. Under s 13(1) this requires a resolution of both Houses of Parliament.

¹⁰⁸ Greiner, press release, April 24, 1992; Metherell, media release, April 24, 1992.

¹⁰⁹ ICAC, media release, "On decision to conduct the inquiry," April 24, 1992. Parliament of NSW, *Hansard*, April 28, 1992, 2793.

(d) In particular, the Commission is to consider whether it is desirable to prosecute or regulate the appointment of persons who have ceased to be members of Parliament to positions in the public sector.¹¹⁰

Metherell stands down

Despite the prospect of an ICAC inquiry, Greiner continued to seek a resolution to the problem. He met with Metherell following the latter's return from Vanuatu. During the meeting he suggested that Metherell either resign from his EPA position or agree to the contract being rescinded. However Metherell would only agree to stand down pending the inquiry. He said that to accede to Greiner's request would have "reinforce[d] the view that his appointment was in some way corrupt".¹¹¹ Metherell said he had not resigned because there was a question of justice involved:

Surely we haven't reached the situation where, when someone ceases to be active in politics in NSW they can no longer hope to play any other constructive role in public service in this State and that's what I sought to do; that's what I seek to do; and that's what I believe I've got skills to do; and I don't see why I should be intimidated from pursuing that creative and constructive course through the public service.¹¹²

Later in the interview, he was even more forthcoming, saying that he had rejected such a suggestion from the Premier :

If I were to walk away, if I were to resign, if I had been terminated today by some sort of agreement, that would have, I think, communicated to the people of NSW some element of guilt, some admission that there had been perhaps some corruption or impropriety here, and I just totally reject and deny that, and it's necessary to see this now, right the way through.¹¹³

¹¹⁰ Letter, Greiner to Carr, April 27, 1992; *Hansard*, April 28, 1992, 2793.

¹¹¹ L. M. Garcia, "Teflon Terry Emerges," *SMH*, April 25, 1992, 1.

¹¹² Terry Metherell, interviewed on *ABC 7.30 Report*, April 24, 1992.

¹¹³ *ibid.*

Metherell said that such a decision could be seen as prejudging the findings of the ICAC inquiry. Speaking on television, Metherell said he expected to be reinstated once the ICAC handed down its report:

I want to play a creative and constructive role serving the NSW community through the NSW Public Service. That's what I've always wanted. That's what this contract would provide and quite properly. It can only provide it if my name and those associated with this decision - all those names - are cleared, and I am confident they will be.¹¹⁴

Metherell's comments would have seemed particularly reassuring to Greiner and other members of the Government, leading up to the inquiry. So too would Metherell's denial that he had deliberately set out to destroy the careers of Greiner, Moore and Hazzard, and his assessment of his relationship with them:

I think the Premier has acknowledged we were close political associates; we weren't close friends. Tim and Brad and I were close friends; we remain close friends and it hurts me enormously to see what they are being put through quite unfairly.¹¹⁵

He also professed his innocence and reiterated his earlier reasons for leaving politics:

I know there has not been any corruption on my part or that of the colleagues and friends with whom I discussed these matters over several months. ... There is nothing corrupt or improper about someone wishing to leave politics to spend some more time with their family, lead a less pressured life while seeking to still play a creative and constructive role serving the community through the public service.¹¹⁶

Metherell's comments seemed to suggest that when the ICAC hearing began the Government could expect positive and supportive statements from him regarding not only his own position, but those of Greiner, Tim Moore and Hazzard as well. As the next chapter shows, however, the

¹¹⁴ *ibid.*

¹¹⁵ *ibid.*

¹¹⁶ *ibid.*

Government was to be bitterly disappointed by Metherell's performance before the ICAC.

Once the decision to conduct an ICAC inquiry had been finalised, the Opposition called for Greiner and Moore to stand down from their positions as Premier and minister respectively pending its findings.¹¹⁷ However Greiner refused, arguing: "[t]here are no specific allegations against me of either corruption or illegality and I look forward to carrying on with the job."¹¹⁸

Censured by Parliament

Whilst the prospect of a no-confidence motion was put on hold with the announcement of the ICAC inquiry, the Premier and Moore still faced a censure motion when Parliament resumed on April 28.¹¹⁹ The Opposition motion was expected to pass the lower house with the support of the Independents, but to be defeated in the upper house, with Nile and his wife likely to vote with the Government. The fate of the motion calling on them to stand down was considered less certain, with both Macdonald and Clover Moore changing their minds over the weekend leading up to the parliamentary sitting.¹²⁰

¹¹⁷ It cited as a precedent the decision of former NSW Premier Neville Wran to stand aside in 1983 when called to give evidence before the Street Royal Commission. In Greiner's case, the Opposition said the Premier had established the precedent himself when, as Opposition leader, he had called for Wran to step down.

¹¹⁸ J. Ferrari and N. Richardson, "Greiner urged to step down for ICAC probe," *Australian*, April 25-26, 1992, 1.

¹¹⁹ Whilst the Government could interpret a censure motion as a vote of no-confidence in the Government, given the make-up of the Parliament, it was not likely that it would take such a view in this instance.

¹²⁰ See Clover Moore media release, "Clover sets the record straight," April 28, 1992; and Peter Macdonald media release, "Manly Independent MP says no further action until after ICAC investigation," April 28, 1992. Macdonald based his decision on the results of a telephone poll undertaken by his staff. The poll surveyed 287 people within the electorate of Manly. Two questions were asked: (1) What do you believe is the most appropriate immediate action to be taken; and (2) If the ICAC shows that the Government acted corruptly, do you believe it should lead to a change of government? The answers to question one were as follows:

| | |
|---|-----|
| . no action until after ICAC investigation is completed | 67% |
| . that the Premier step aside | 18% |
| . that the Minister, Tim Moore, step aside | 12% |
| . none of the above | 3% |

In response to question two, 19% said 'yes' and 81% said 'no'. Clover Moore changed her mind after discussions with John Marsden, the then President of the NSW Law Society. Marsden was

The Opposition used the motion referring the appointment to the ICAC to attack Greiner on a number of fronts, accusing him of misusing his power, of breaching his earlier promises not to engage in jobs-for-the-boys and to improve parliamentary standards. They continued to label the appointment 'corrupt' and highlighted the Premier's role therein. Carr said the fundamental question was whether there had been a violation of public trust or not. Citing the ALP's legal advice, he said that "... central to this whole affair is the inviolable truth of our democratic tradition that 'a member of Parliament is elected to serve, not bargain his seat for personal advantage'."¹²¹ He said there was prima facie evidence that the actions of Metherell, Moore and possibly Greiner involved criminal conduct and that the appointment was contrary to the "known rules of honesty and integrity implicit in the Common Law definitions of bribery".¹²² The advice was that they were party to a "double barrelled act of bribery. That a parliamentary seat was bartered for a profitable job".¹²³ According to Carr, the Opposition's advice was that:

There is an inescapable inference that Dr Metherell was induced to resign by the offer to him of a governmental position and prima facie this constitutes common law bribery or corruption in office to which he and Mr Moore are a party and to which Mr Greiner was an accessory. There also appears to be the offence of criminal conspiracy to corruption on the part of Dr Metherell and Mr Moore and by inference Mr Greiner.¹²⁴

Carr not only differentiated between the Metherell affair and so-called jobs-for-the-boys, but he also sought to play up Greiner's involvement in the appointment, claiming it was "central".¹²⁵ Not only did he seek to undermine Greiner's "situational morality" argument, but he also accused the Premier of having "deliberately created confusion" over the

a former partner with Industrial Relations Minister John Fahey in a law firm and had strong contacts on all sides of politics.

¹²¹ NSW Parliament, *Hansard*, April 28, 1992, 2795.

¹²² *ibid*, 2796.

¹²³ *ibid*, 2796.

¹²⁴ *ibid*.

¹²⁵ *ibid*.

nature of the appointment, and of being involved in a "cover up".¹²⁶ While the Opposition seemed to believe that, based on the legal advice it had received, the case against Greiner was not as strong as those against Metherell and Moore, it believed that the Government's credibility and public standing would suffer greater damage if the Premier could be implicated as a key player than if the full (or principal) responsibility was sheeted home to a minister and a disaffected former member. With that in mind, Carr argued that a number of questions needed to be answered, the responses to which would involve what he called the "ultimate test" - violation of public trust and "public confidence in our institutions".¹²⁷ It was a smart ploy on Carr's part. On the one hand he was responding to and tapping public sentiment which had surfaced as a result of the Metherell appointment and, on the other, he was reminding voters of the key planks of Greiner's 1984 and 1988 election campaigns.

Opposition and Independent speakers alike played on the emotionalism of the debate. Hatton described the Government's actions as "totally unacceptable and immoral", claiming that nothing which came out of the ICAC inquiry would "remove the stain of censure", which it had attracted.¹²⁸ He said it was irrelevant who made the initial approach, but that:

When Dr Metherell said he wanted to leave Parliament and was interested in a Public Service job he should have been told there and then to resign and take his chances. That would have put an end to the matter.¹²⁹

Hatton's argument was significant because it provided a clue to his likely response once the ICAC concluded its inquiry. The other Independents were likewise critical.

Both Greiner and Moore agreed that the debate was "basically about ethics" but argued that the actions of all people involved would be

¹²⁶ *ibid.*

¹²⁷ *ibid.*, 2795.

¹²⁸ *ibid.*, 2801.

¹²⁹ *ibid.*, 2802.

cleared by the inquiry.¹³⁰ For his part, the Premier claimed: "... there is no corruption on my part, there is no illegality on my part, and there is no impropriety on my part".¹³¹ However he acknowledged his obligation to account to the Parliament by promising that it would be recalled within a week of the report being published to enable the findings to be debated.¹³² Greiner used his closing comments to try and convince the House that any further parliamentary debate should be postponed until after the ICAC inquiry:

Any sort of parliamentary action would then be based on a reasoned assessment of what happened, rather than on newspaper stories, which is basically the situation at the moment.¹³³

These comments were obviously directed at Clover Moore, Macdonald and Windsor, whose uncertainty over what action they would take had been widely reported in the media.¹³⁴ Despite this, Greiner's plea was to no avail as the subsequent votes on the censure motion showed.

Immediately after the Premier's motion to refer the appointment to the ICAC was passed, Carr moved a six point motion censuring Greiner and Moore, demanding that they stand aside from their positions as Premier and Minister respectively pending the ICAC Inquiry and calling on the Government to rescind Metherell's appointment and to introduce legislation blocking any claim he may have to compensation.¹³⁵ The

¹³⁰ *ibid*, 2841.

¹³¹ *ibid*, 2840.

¹³² *ibid*, 2841.

¹³³ *ibid*.

¹³⁴ See, for example, N. Richardson and J. Ferrari, "Cabinet backs Greiner over Metherell affair," *Australian*, April 28, 1992, 1.

¹³⁵ The precise terms of the censure motion were as follows: (1) That the Premier, Treasurer and Minister for Ethnic Affairs is deserving of the censure of this House in relation to all matters involved in 'The Metherell Affair'; (2) That the Minister for the Environment is deserving of the censure of this House in relation to all matters involved in 'The Metherell Affair'; (3) That the House having resolved to refer the matters to the Independent Commission Against Corruption for consideration and report calls on the Premier, Treasurer and Minister for Ethnic Affairs to stand aside pending the issue of the report of such inquiry; (4) That the House having resolved to refer the matters to the Independent Commission Against Corruption for consideration and report calls on the Minister for the Environment to stand aside pending the issue of the report of such inquiry; (5) That this House calls on the Government to forthwith rescind the appointment of Dr Terry Metherell to the Senior Executive Service and further to immediately introduce legislation to make unlawful any claim for compensation lodged by Dr Metherell subsequent upon the recission of such appointment; and (6) That pursuant to Standing Order 179, the

Lower House debate involving 12 speakers¹³⁶ lasted nearly five hours before each of the questions was put to the vote at 1.30 am. The censure motions against Greiner and Moore were both passed 50/45 with the four Independents - Hatton, Moore, Macdonald and Windsor - all giving their support. Terms three and four, calling on them to stand aside were defeated 47/48, with Hatton the only Independent to support the motions. The final motion - that Metherell's appointment be rescinded and legislation be introduced into the Parliament to prevent him receiving compensation was passed 49/46, with Windsor voting with the Government to oppose the motion.

In moving the censure motion, Carr again sought to differentiate between the Metherell appointment and traditional jobs-for-the-boys type appointments, claiming there were different elements involved:

It is about corruption - the gross corruption of administrative procedures and the corruption of parliamentary processes. It is about the pattern of manipulation leading to the Metherell appointment. It is about the pattern of deception by which the Premier has sought to excuse it. I use the word pattern deliberately and emphatically. This was no one-off affair, some momentary aberration of judgment. The appointment was preceded by a month of manipulation and followed by days of deceit. It is precisely because of the systematic manipulation and deception that the truth of the matter has been so hard to come by, wrung out of the Premier bit by bit in statement after contradictory statement. But from all the distortions and contortions, the basic, incontrovertible truth emerges; the central, incontestable fact.¹³⁷

Given that the appointment was about to be investigated by the State's anti-corruption agency, Carr's tactic was a shrewd one. He argued that there were two elements to the appointment: (1) the fact that a seat had been exchanged for a job; and (2) that the negotiations had taken place

resolutions be put seriatim to the House. From Carr's point of view the latter was important because, like Greiner, he did not know the non-aligned Independents' voting intentions and did not want the motion jeopardised by the prospect of one or other of the Independents voting against it simply because they did not agree with one clause (See *Hansard*, April 28, 1992, 2842).

¹³⁶ They were Carr, Greiner, Moore, the four Independents, Wal Murray, the Leader of the National Party and Deputy Premier, Peter Collins, the Attorney General, John Fahey, the Minister for Industrial Relations, Dr Andrew Refshauge, the Deputy Opposition Leader, and Michael Knight.

while Metherell was voting in the House. "No names, no pack drill, but the Government had to get that vacancy and had to pick up that seat."¹³⁸ Carr's desire to lay the blame at the Government's and, more particularly, the Premier's feet, was reflected in his outline of the facts. He claimed:

First, the former Member for Davidson was offered and accepted an inducement to vacate his seat in the House. Second, the inducement was an appointment to the Senior Executive Service at a salary of \$110,000 per annum under a five-year contract. Third, to effect this deal the Premier arbitrarily created a senior executive service position within his own department. Fourth, in the whole period in which the deal was being stitched up the then member for Davidson voted in divisions absolutely vital to the Government. Fifth, the Premier deliberately practised deception and authorised misinformation as part of a sustained cover-up. These are the heads of the indictment against the Government and in particular against the Premier.¹³⁹

The use of emotive phrases such as "offered and accepted an inducement", "Premier arbitrarily created a ... position within his own department", "deal was being stitched up", and "sustained cover-up", coupled with direct references to the Premier's own involvement highlighted Carr's intentions. Carr was playing to two audiences - on the one hand, he was appealing to the non-aligned Independents who held the balance of power and with that the key to the Premier's and the Government's future. He was also playing to a large and attentive audience, namely the voters of NSW who would decide the Government's future in 1995 if it were to survive the current crisis.

In supporting the censure motion, Hatton said: "there is no contrition, there is no public expression that they even regret what they did".¹⁴⁰ But Hatton did make an important concession when he said that the Government did not deserve to have a vote of no confidence moved against it:

¹³⁷ *ibid*, 2843.

¹³⁸ *ibid*.

¹³⁹ *ibid*.

¹⁴⁰ *ibid*, 2863.

There is no question of a motion of no confidence being moved or supported unless, under the agreement [between the Government and the non-aligned Independents] there is gross mismanagement which reflects on the entire government, or corruption.¹⁴¹

Clover Moore likewise criticised Greiner, accusing the Premier of breaking his own rules. But whereas Hatton had accused him of showing no contrition, Moore said:

I believe that at the end of last Thursday's meeting [between the Government, herself and Macdonald], he made an admission that he realised he had broken those rules, made an incredible mistake and descended to the depths of others. I believe that if we could go back in time and he could see the outcome, he would not have taken that action.¹⁴²

Greiner's strategy during the debate was two-fold. On the one hand he pursued the earlier strategy of seeking to undermine the ALP's credibility, by accusing it of having made similar appointments in the past. The second part of his strategy was to convince the Independents not to support a censure motion before the ICAC had handed down its report, because this would put himself and Tim Moore in a situation of 'double jeopardy' whereby they would have to answer to the Parliament twice - the first occasion when all the facts surrounding the appointment had not even been released and then again after Commissioner Temby had reported.

The Premier's statement contained elements of contrition and defence and underlined the difficulty inherent in attempting to apply a situational morality in circumstances where it was inevitable that there would be some opposition to the appointment. On the one hand he conceded:

The decision to allow the appointment of Dr Metherell was a misreading of the public mood, a mood of anxiety and cynicism bordering on mistrust. I acknowledge that I failed to fully understand that deep seated resentment in the community about political manoeuvres. I understand that resentment. I have acknowledged it openly, fully and squarely. I have stated publicly

¹⁴¹ *ibid.*

¹⁴² *ibid.*, 2890.

that I have heard the message loud and clear from the electorate. I have never sought to betray the faith shown in me by the people of New South Wales to provide better government practice.¹⁴³

On the other hand, however, he said that while electors may regard the appointment as inappropriate, "... it was not illegal, it was not immoral, it was not corrupt".¹⁴⁴ Greiner's account also contained an important warning:

If what the Minister for the Environment did and what I did was corrupt, then in my judgment every political appointment that has ever been made in this State was corrupt. It will not be the case of the Leader of the Opposition or of a Leader in the Upper House reserving for themselves certain positions that they intend to use for political appointments. It will simply be against the law. If what we did was wrong then let every member on the other side of the House understand that the brand of New South Wales right wing Labor politics which has been its stock in trade over the past thirty years will be not just immoral, but it will be seen as corrupt and it will be sanctioned with all the same feeling that has been expressed on this occasion. Ultimately, if what was done was against the law, then all honourable members need to understand that it is, for practical purposes, the death of politics in this State.

Once a political party is elected to office it will be against the law for it to make decisions which are in any way influenced by political considerations. There will be no question of government paying particular attention, for example, to the needs of marginal seats; it will no longer be just a matter of politics - it will be against the law. What the Opposition and the media have opened up here is the very nature of politics itself - that is the conflict between the demands of politics and the demands of public office.¹⁴⁵

In seeking to pigeonhole the Metherell appointment alongside the others, and to play down the impropriety of the Government's actions, Greiner questioned whether the uproar was due to "a media witch hunt or public antagonism towards Dr Metherell".¹⁴⁶ There may have been more than a modicum of truth in both options, given that media interest in the appointment had blown to fever pitch with the likelihood of an

¹⁴³ *ibid.*

¹⁴⁴ *ibid.*

¹⁴⁵ *ibid.*, 2858.

¹⁴⁶ *ibid.*, 2855.

inquiry.¹⁴⁷ However Greiner himself may have been closer to the point when, in an apparently flippant comment, he remarked: "Or perhaps we only get to censure Premiers when there is a particular balance in the Parliament".¹⁴⁸

Greiner's difficulties did not abate in the lead-up to the ICAC Inquiry on May 11. Whilst a similar motion in the upper house was defeated with Nile's support, Greiner was criticised for not acting upon the lower house resolution that Metherell be dismissed without compensation.¹⁴⁹ During that time another problem emerged for the Government too. Cabinet had decided that it would pay the costs of legal representation for Greiner, Moore and Humphry in appearing before the ICAC. The Attorney General, Peter Collins, however, had refused an application from Metherell and Hazzard that they be similarly provided for.¹⁵⁰ Cabinet's decision, and Collins' apparent reluctance to exercise his discretion under the ICAC Act, provided further ammunition for critics of the Metherell appointment.

For Greiner, the only high point of the first month following the press conference was the result in the Davidson by-election. The Liberal candidate, Andrew Humpherson, was elected with a heavily reduced majority on the previous result.¹⁵¹ Whilst the result suggested that Greiner's decision to appoint Metherell had been vindicated, the Premier could have been excused for questioning whether the result was worth the cost. The ICAC inquiry and the responses to Ian Temby's findings would provide the answers to that question.

¹⁴⁷ Greiner himself had highlighted the fact that in the past media interest in such appointments was fairly transitory.

¹⁴⁸ *Hansard*, 2855.

¹⁴⁹ J. Ferrari, "Greiner defies Parliament's call to sack Metherell," *Australian*, April 30, 1992, 2.

¹⁵⁰ Collins was empowered under s 52 of the ICAC Act to provide legal or financial assistance. According to s 52 (2) The Attorney General may approve the provision of legal or financial assistance to the applicant if of the opinion that this is appropriate, having regard to any one or more of the following: (a) the prospect of hardship to the witness if assistance is declined; (b) the significance of the evidence that the witness is giving or appears likely to give; (c) any other matter relating to the public interest.

¹⁵¹ The swing needed to unseat the Liberal Party based on Metherell's performance was 22 percent. Humpherson was elected after a 16 percent swing against the Liberal Party. See J. Ferrari, "Greiner blames hype for 16pc drop," *Australian*, May 4, 1992, 1.

Conclusion

The chapter highlights the importance of issue management, particularly in the early days of a crisis. It is obvious that the Greiner Government not only misread the political response to the Metherell resignation and appointment, it also failed to counter the criticism which followed, particularly from the Opposition and the non-aligned Independents. In part this was perhaps due to the public perception - capitalised on by the Opposition and the non-aligned Independents, and not quashed by the Government - that Greiner had eschewed jobs-for-the-boys style appointments. During this first period, the Government responded to this perception in a number of ways. Firstly, it tried to distinguish between jobs-for-the-boys on the one hand, and political appointments on the other. The latter were appointments based on merit, and the Government claimed that the Metherell appointment should be so classified, whereas jobs-for-the-boys were appointments to positions for which the appointee was not qualified. Secondly, it sought to apply a situational morality to the appointment, claiming that such appointments were not uncommon in NSW and that the ALP had a history of similar appointments. Because of this, it argued, the Opposition could not criticise the appointment or seek to have it over-turned.

However the Government's strategy failed and it was unable to contain the issue. The Opposition was able to counter the jobs-for-the boys allegations by distinguishing between appointments to statutory positions on the one hand, and Public Service appointments on the other. In this regard it was aided by the PSM Act which appeared to lay down particular requirements for appointment to the NSW Public Service, including appointment by merit and the need for positions to be advertised. The Opposition was able to paint a picture of a Government which preached high standards, but practised at a much lower level. When the Opposition was able to release legal advice which suggested possible

corruption or bribery on the part of the key participants, the Government was beginning to look particularly vulnerable.

The Opposition's legal advice, coupled with the announcement of an ICAC inquiry, meant that it would be increasingly difficult for the Government to continue to argue that such appointments were part and parcel of politics. Nor was it able to sustain – in the eyes of the Opposition and Independent MPs – the key arguments that: (1) it had a moral entitlement to Metherell's seat, given that he had originally been elected to Davidson as a Liberal MP; (2) it was simply allowing the people of Davidson to vote for a member who represented the political party of their choice; and (3) Metherell was qualified for the position.

The problem for the Government was that ICAC was required under its Act to assess behaviour according to quasi-legal criteria. In their justifications, Greiner and Moore were clearly appealing to popular definitions of corruption, rather than a formal-legal approach. Linked to this were two additional problems: (1) the non-aligned Independents' warning that any finding of gross maladministration or corruption would lead to a no-confidence motion; and (2) Hatton's claim that the conduct of Greiner and Moore was "unacceptable and immoral" and that no matter what its finding, the ICAC inquiry would not change the "stain of censure" that had flowed from the appointment.

Thus not only did the Government struggle to apply a situational morality argument which was acceptable to all MPs, friend and foe alike, but it appeared that the Premier would struggle to clear himself, given the diverging attitudes towards the labelling of the conduct that had emerged during the early stages. That difficulty became even more obvious during the ICAC hearing stage when the difference between political standards and formal-legal definitions became even more starkly obvious. It is to that stage which the thesis now turns.

Chapter 5

Struggling with a situational morality: Convincing the ICAC

Introduction

As the previous chapter revealed, the Greiner Government struggled to manage or control the fall-out from the Metherell appointment in the period immediately following the announcement. This chapter shows how that task did not improve during the formal inquiry stage when Greiner and Moore again failed to manage this issue. In this chapter it will be argued that they were unsuccessful for a number of reasons: (1) because of the difficulties Chibnall and Saunders outlined in relation to the adoption of a situational morality in an arena where such a morality might be subjected to questioning and, in fact, may be contrary to formal-legal standards; (2) the disparities between their evidence and that provided by Metherell; and (3) the order in which evidence was received by the Commission and cross-examination was conducted.

This chapter is divided into two parts. Part one covers the public session during which the details surrounding the resignation and appointment were uncovered. This evidence was collected over nine days, all of which were open to the public.¹ The second part of the chapter covers final submissions from counsel, during which they addressed the Commission on the nature of the conduct and whether it satisfied the requirements of sections 8 and 9 of the ICAC Act, that is whether the appointment

¹ The Commission sat on May 5, 11- 15, 21-22, 25 and 27- 29. During the last three days, the inquiry was conducted in camera. Whilst the fact-finding part of the inquiry (May 11-25) was open to the public, there were occasions when Commissioner Temby went into private session to hear submissions from counsel.

amounted to corrupt conduct or not. Final submissions were heard over three days and were closed to the public and the media.²

It will be argued that in line with Chibnall and Saunders' argument (detailed in chapter two and applied in chapter four) and following on from the work of McGraw, Dyer and Bennett (likewise outlined in earlier chapters), that Greiner and Moore would be disadvantaged by the move to a more formalised arena – namely the ICAC. Whilst it could be argued that there were some benefits from such a move (from the Government's point of view this meant that those stakeholders who were not directly involved in the inquiry, namely the Opposition and the non-aligned Independents, were effectively sidelined), against this, however, were a number of clear disadvantages. Once a witness entered the witness box they effectively became a captive of the process. They would be subject to questioning and cross-examination, not only from the Commissioner, but also from counsel assisting the Commission and lawyers representing the other witnesses.

It will be argued that they will struggle to justify their behaviour for a number of reasons. Firstly, because the inquiry process will focus on the motives which led to Metherell's resignation from Parliament and appointment to the EPA. As the discussion in chapter two revealed (particularly the arguments of MacIver and Mills), it is often difficult to distinguish between the actual motives and the so-called 'parade of motive'.³ Secondly, it will be argued that Greiner, Moore and the other witnesses faced another potentially more critical problem, particularly during the second part of the inquiry when final submissions were being presented. This has to do with the particular definition of corrupt conduct contained in the ICAC Act. Because ICAC is a quasi-legal institution and the definition of corrupt conduct is couched in formal-legal terms, Greiner and Moore's ability to justify their conduct through the use of a

² Under a 1991 amendment to the ICAC Act, Temby could conduct the inquiry in private, in public or as a combination of each, depending on the public interest.

³ MacIver, "The Imputation of Motives," 8.

situational morality – or even by appealing to past popular standards of behaviour – is substantially lessened.

The inquiry process

Soon after the inquiry was convened on May 5, Commissioner Temby rejected a request from Carr that he be legally represented at the inquiry.⁴ Temby said that Carr's political interest in the outcome [that is the prospect of a change of government], did not satisfy s32 of the ICAC Act which required that he be "substantially and directly interested in the subject matter of the hearing."⁵ This ruling was significant in that it reduced the prospect of the inquiry becoming adversarial in an overtly party-political sense.⁶ Whilst Temby indicated some support for a situation in which there were contending parties at the hearing, he nonetheless warned counsel:

The public interest, not political contention must prevail within this hearing room. We want the job done in a dispassionate atmosphere, devoid of political accusation.⁷

⁴ Each of the witnesses was represented by a team headed by a Queens Counsel. They were Roger Gyles, QC (for Greiner), Chester Porter, QC (for Moore), David Rofe, QC (for Metherell), Peter McClellan, QC (for Humphry) and Lionel Robberds, QC (for Hazzard). Not surprisingly, this provoked some debate in the Letters to the Editor columns, particularly in relation to the public cost of the inquiry.

⁵ Despite this, Temby did pave the way for Carr to provide counsel assisting with written submissions and for the ALP to make further applications for legal representation as the inquiry progressed. The ALP subsequently made a submission that it be allowed to be present during the private session when final submissions were presented. This request was also refused by Temby. See transcript, May 27, 1992, 19.

⁶ This was in line with arguments put by counsel representing Moore, Greiner and Metherell. Chester Porter QC, for Moore, argued that the approach of counsel for the Opposition would be deliberately adversarial and therefore contrary to s17(2) of the ICAC Act. S17(2) states in part that "...hearings shall be conducted with as little emphasis on an adversarial approach as is possible". For Porter's argument see transcript, 9. Porter was supported by Rofe and Robberds, the latter claiming that neither Carr nor any other member of the parliamentary Labor Party could claim to be substantially and directly interested in the subject matter of the hearing as required under the Act because they did not claim to be, nor were involved in, any of the facts or circumstances surrounding Metherell's appointment. See transcript, 10. He further argued that to grant counsel for the ALP the right to appear would "... result in the Labor Party members of Parliament being opposed in an adversarial manner against the members of the Liberal Party who will be witnesses and who have been authorised to appear". Robberds argued that if the Labor Party wished to assist the Commission, it could do so by providing it with any information it possessed. This was also endorsed by Counsel Assisting the Commission, Peter Clark. See transcript, 21-22.

⁷ Transcript, 36.

Temby also urged MPs to observe the "evolving convention" under which matters before the ICAC would not be discussed outside of the Commission.⁸ Whilst MPs observed that convention, there were occasions during the hearing when Temby drew counsels' attention to, or had his attention drawn to, remarks made by witnesses or their spouses outside of the hearing room.⁹ He was also asked to intervene on behalf of witnesses who counsel believed were being questioned in an unnecessarily adversarial manner. Temby's apparent desire to minimise the impact of politics on the inquiry was also reflected in his decision to appoint a Victorian barrister, Peter Clark, as counsel assisting, rather than a member of the NSW Bar.¹⁰

Unravelling the detail

In his opening address, Clark said the Commission was required to address four questions:

- (1) Was Metherell offered an inducement to resign his seat in Parliament?
- (2) Was any agreement or arrangement made by any MPs to secure his resignation to bring about a by-election in the seat of Davidson?
- (3) Was Metherell offered any inducement to influence the performance of his parliamentary duties?; and
- (4) Was he selected and appointed to the position of policy director in the Premier's Department contrary to the spirit and provisions of the *Public Sector Management Act 1988*?¹¹

Whilst on the surface the questions appeared relatively innocuous, from the time that counsel began reading out the first statements from

⁸ *ibid.*, 7.

⁹ At different times Temby singled out Greiner, Michael Egan and Kathryn Greiner for criticism. In the case of Greiner and Egan, Temby cautioned them at the preliminary hearing for comments made before the inquiry proper began. See transcript, May 5, 1992, 18-19. Kathryn Greiner, on the other hand, was chided for a public response to Metherell's evidence. This is discussed in further detail when the media's coverage of the appointment is discussed. See transcripts, May 13, 1992, 282-5.

¹⁰ He opted for Clark, who had previously been a member of the National Crime Authority in 1987-88 and had previously worked with Temby in setting up the Commonwealth office of the Director of Public Prosecutions (DPP).

witnesses, it was evident that Greiner and Moore (if not the whole Government) would struggle to survive the inquiry. The Government was disadvantaged on a number of counts. First, because of the order in which evidence was heard. The first witness to give evidence was Metherell. This meant that Greiner, Moore and Hazzard were obliged to respond to Metherell's written statement and the answers he gave during almost three days of cross examination. In Greiner's case, he did not give evidence until seven days after Metherell had completed his testimony and following on from Hazzard and Moore. Second, unbeknown to the other witnesses, Metherell was a prolific diarist who had carefully recorded the detail of meetings and conversations he had during the negotiation period. None of the other witnesses kept detailed personal diaries or referred to their appointment diaries when preparing their statements for the Commission. Not only that, but Greiner, Moore and Hazzard were all forced to change their written statements on the strength of the "Metherell Diaries" as they became known. The key differences included the timing of meetings between Greiner and Metherell and a telephone conversation between Greiner and Metherell preceding the vote on the Timber Bill in early March. This meant that while the inquiry was inquisitorial in a legal sense, the disparities in evidence between Metherell on the one hand and Greiner, Moore and Metherell on the other, turned it into an adversarial contest in a political sense.

Impropriety denied

The tactics of Greiner, Moore, Metherell and Hazzard were clear. All continued to deny that there had been any corruption or impropriety on their part. Both Moore and Hazzard told the inquiry that their desire to help Metherell was motivated in part by their friendship for him. Hazzard said his friendship with Metherell extended back a number of years.¹² He told how Metherell had helped him win his seat in Parliament and how their friendship had survived Metherell's decision

¹¹ Clark, transcript, May 11, 1992, 45.

to resign from the Liberal Party, despite this having caused him some personal soul-searching for a number of weeks thereafter.¹³ In fact he went so far as to tell the inquiry that he "trusted him completely",¹⁴ until the release of the diaries.

Metherell's views towards Hazzard were likewise mixed. At one stage he referred to Hazzard as being "like a brother" and commended him for his support.¹⁵ However during cross examination he conceded that he believed part of Hazzard's motivation in helping him secure the appointment was the belief that it: "...would probably put him in good favour with the Premier or the Government".¹⁶ This conflicts with Hazzard's statement that it was some time after their first discussion that he realised the political implications of Metherell's possible resignation.¹⁷

In his evidence to the Commission, Moore said his decision to help Metherell was influenced by four factors: (1) their friendship; (2) Metherell's abilities; (3) what he believed to be in the best interests of the Government and the electors of Davidson; and (4) the public interest in achieving stable government in NSW.¹⁸ Moore described Metherell as a "friend and colleague".¹⁹ He also said that he had the "greatest admiration for Dr Metherell's intellect, ability and drive. His thoughtful, informed views have always had my respect."²⁰ Moore told the inquiry he had been "personally distressed" when Metherell had left the Liberal Party; that he had provided a reference when Metherell was charged with taxation offences; and how they had been bushwalking colleagues for years.²¹ He also told how they were environmental soul mates.²² Regarding their

¹² Hazzard, transcript, May 11, 1992, 69.

¹³ *ibid.*

¹⁴ *ibid.* See also cross-examination, May 14, 1992, 471.

¹⁵ Metherell, transcript, May 12, 1992, 273.

¹⁶ *ibid.*, 295.

¹⁷ Hazzard, statement, 74-5.

¹⁸ Moore, statement to Commission, May 11, 1992, 53.

¹⁹ *ibid.*, 51.

²⁰ *ibid.*

²¹ *ibid.*

²² However even Moore came under criticism from Metherell on environmental matters.

Metherell, in his statement to the Commission, told how he had felt betrayed when Moore had placed a 60 m depth limit in the Nattai National Park which would have permitted the exploration of mining for coal and gas below that depth. See transcript, May 11, 1992, 96-7.

friendship, he said: "I felt that, as his friend, he was slowly turning himself inwards and destroying himself."²³ Nonetheless, he did say that while friendship had influenced his decision to appoint Metherell and to embrace an unorthodox process to achieve that result, he would not have appointed him if he were not "suitable".²⁴ He also argued that while he had been aware of the political consequences of Metherell's decision from the outset: "it would not have been my dominant reason for acting on it".²⁵ The extent of the friendship between Hazzard, Moore and Metherell was highlighted during the inquiry when it was revealed that they met on a number of occasions, sometimes with their wives, for meals together, or to discuss the appointment.²⁶

While friendship helped explain Moore and Hazzard's reasons for helping to assist Metherell, this did not explain the relationship between Metherell and Greiner. According to Metherell, they had "a good professional relationship" during the Government's first term in office, but not a personal one.²⁷ He was critical of the support Greiner had offered during his taxation case, claiming that it was "less supportive than he should have been and I believe I would have been in his situation".²⁸ Metherell described his feelings toward Greiner as "equivocal ... a mixture of admiration and some concern".²⁹ Furthermore, he told the Commission that he had found it difficult to trust Greiner after he was

²³ Transcript, 553. This was significant, for Moore in his statement to the Commission had indicated the extent of the pressure he was under and how because of this he had already indicated to the Premier that he was intending to resign from the Parliament during the current term. See in particular his comments on page 65 where he indicated that he had "found the strain over the years enormous and reached my decision after consultation with my wife". This shows the parallels between what both men had been feeling and hence, given their friendship, it was understandable how Moore could appreciate the pressures Metherell was experiencing and therefore his desire to help him.

²⁴ Moore, transcript, 558.

²⁵ *ibid.*, 548.

²⁶ The inquiry heard that during the relevant period they dined together on February 9 (the Metherells, Hazzards and Moores) at Metherell's house, March 15 (Metherells and Brad Hazzard) at Hazzard's and April 5 (Metherells and Moores) at the Moore's. Whilst the appointment was not discussed at the first get-together, it was at the second and third. At the April 5 brunch, Moore and Metherell discussed the type of work Metherell would be undertaking in his new role at the EPA. See transcript, 124-125.

²⁷ Metherell, transcript, 149.

²⁸ *ibid.*

²⁹ *ibid.*, 367.

not returned to Cabinet following the 1991 NSW election.³⁰ In fact Metherell said he believed the Premier's decision not to restore him to the ministry had helped destroy his political career.³¹ His distrust of Greiner was evidenced by his desire to have Hazzard present at the "glass of water" reunion meeting on February 26 and at the Parliament House lunch on March 27. It also emerged from some of his diary entries and recollections of conversations with his wife Louise.³²

This mistrust was reciprocated by the Premier during cross examination. Greiner agreed with Clark that Metherell's resignation from the Liberal Party was "an act of gross disloyalty", the act of a "deceitful man", the action of a man "capable of treachery".³³ He said that he had been "totally bemused and amazed at the action he [Metherell] had taken and the way he had taken it".³⁴ Despite questioning from Clark as to how he could contemplate appointing an individual whom he considered treacherous to such a position, Greiner continued to defend the appointment. Greiner reiterated his earlier justifications of the appointment and told the Commission he believed Metherell could have performed the duties of policy director in his department "admirably".³⁵ Asked by Clark whether he believed Metherell was capable of political treachery again, he deflected the question by answering: "It was a very particular set of circumstances."³⁶

During his evidence, Moore explained that he did not want to see Metherell prevented from taking up a public sector position because of his political baggage.³⁷ Moore told the Commission that it was this wish which saw them opt for the unorthodox process outlined, rather than advertise the position and expect him to apply for it in a conventional

³⁰ *ibid.*, 369.

³¹ *ibid.*, 351, 366-71.

³² *ibid.*, 370.

³³ Greiner, transcript, 633.

³⁴ *ibid.*

³⁵ *ibid.*, 636.

³⁶ *ibid.*, 638.

³⁷ Moore, transcript, 615.

manner.³⁸ It was generally accepted that if the appointment was subjected to a formal application and selection process then every part of it would be open to question.³⁹ Methereell himself expressed concern that if it was subject to the normal processes then it would be leaked to the media.⁴⁰ Following on from this, it was decided that the position would not be advertised.

In taking this approach Greiner and Moore were supported by Humphry, who in his evidence said there were provisions within the PSM Act for direct appointments to SES positions.⁴¹ While he conceded that this applied to internal appointees, he believed the solution which he suggested, namely that Methereell be appointed to one of the generic positions within the Premier's Department and then seconded to the EPA, satisfied the requirements of the PSM Act (see Appendix B).⁴² In his evidence, Humphry acknowledged that before he could advise such a course of action he had to assure himself that Methereell satisfied the merit requirements of s26 of the PSM Act.⁴³ He said that during the course of the meeting he compared Methereell's qualifications with those of the three other outstanding applicants produced by the generic advertisements and was satisfied that Methereell was the best person.⁴⁴ He also said that in assessing Methereell's suitability, he considered: (1) Moore's wish to appoint him and his belief in his ability; and (2) the fact that Greiner would concur if the process satisfied the legal requirements of the Act.⁴⁵ "There was no unlawful act that I was aware of," he said.⁴⁶ Questioned as to why he did not ask for time to think about a possible course of action, Humphry replied: "we do not have the luxury of being able to come back and revisit issues on a constant basis".⁴⁷ He said further:

³⁸ *ibid*, 558.

³⁹ Methereell, transcript, 119; Moore evidence, 554, 556.

⁴⁰ Methereell, 120, 194, 200-2.

⁴¹ Humphry, evidence, May 22, 1992, 819.

⁴² *ibid*, 814.

⁴³ *ibid*, 814-5.

⁴⁴ *ibid*, 816.

⁴⁵ *ibid*.

⁴⁶ Humphry, statement, 167.

⁴⁷ *ibid*, 815.

I had received advice and I think correct advice that normal selection processes could not apply in this case and give the outcome which was intended by that selection.⁴⁸

He said that had Metherell applied for the job through a normal process, not only would the selection process itself be queried, but so would his voting during the six to eight week period the process took to run its course.⁴⁹ While he conceded that his selection of Metherell involved considerable "mental gymnastics"⁵⁰ and agreed that there may have been another candidate among the applicants not drawn to his attention who "could not be ignored", Humphry argued: "I believed that - and I still believe that Dr Metherell has the best qualities for that job, of any person that was likely to apply."⁵¹

Despite the obvious tensions between Greiner and Metherell and the latter's friendships with Hazzard and Moore, all argued that while the appointment process was unorthodox, it had to satisfy the requirements of the PSM Act. This was clear from Greiner's evidence. It was also evident in the denials from Metherell, Moore and Humphry to a suggestion from Clark that the resignation from Parliament was a political precondition of his appointment to the SES.⁵² Rather, they argued, it was a legal precondition.⁵³ For his part, Moore argued that the EPA position would ultimately have been created, irrespective of whether Metherell opted to take it up or not.⁵⁴ He also said that his discussion with Shepherd regarding the creation of the position would have taken place at that time irrespective of Metherell's interest in the job.⁵⁵

⁴⁸ *ibid.*

⁴⁹ *ibid.*, 819.

⁵⁰ *ibid.*, 817.

⁵¹ *ibid.*, 824.

⁵² Moore, transcript, 552.

⁵³ Moore, statement, 65; evidence 551-2, 555. This was to cover the requirements of the *Constitution Act*, which had earlier prevented Barry Jones from taking up an EPA Board appointment.

⁵⁴ Moore had actually prepared a draft advertisement which he said was to cover the situation in the event that Metherell did not follow through with his intention to seek appointment to the position. See transcript, 60.

⁵⁵ Moore, transcript, 558; statement to Commission, 55.

In further seeking to refute the suggestion that there had been a deal involving the exchange of a job for a parliamentary seat, Greiner and Moore also pointed to Metherell's uncertainty over whether he would resign or not.⁵⁶ The Commission heard that at no time prior to April 10 was it certain that Metherell would resign. Metherell's own evidence was that throughout the entire period he continued to reassess his position.⁵⁷ In pinpointing the timing of his decision, Metherell said it was after the March 12 meeting with Hazzard and Moore - the meeting at which he had first heard of the EPA executive director position - that he made "a fairly firm decision ... that I would be leaving public life".⁵⁸ However he told the Commission that he continued to assess his position until after the meetings with Shepherd on April 9.⁵⁹ Metherell's indecision was noted by both Hazzard and Moore in their statements to the Commission. Dismissing any suggestion of a binding agreement, Moore said he did not finally hear from Metherell until April 10 that he would be resigning.⁶⁰ Furthermore, he said that Metherell had until 4.42 pm on April 10 [when he handed his resignation to the Speaker] to change his mind.⁶¹ Questioned by Temby, Moore agreed that (1) he was not irrevocably bound to proceed to create the position and appoint Metherell to it; (2) Metherell was not irrevocably bound to carry through with the resignation; and (3) Greiner was not committed to the creation of the position.⁶² According to Moore, at no time was Metherell's resignation a "condition precedent" of anything.⁶³ He said there was never an arrangement whereby there would be a resignation for a job.⁶⁴

⁵⁶ *ibid*, 552, 554.

⁵⁷ Metherell, evidence, 176-81.

⁵⁸ *ibid*, 181. That he was seriously considering it at that stage is confirmed by the fact that on March 16 he had tentatively booked the holiday in Vanuatu. Although the holiday was not confirmed until March 30. See transcript, 200.

⁵⁹ This was corroborated by Hazzard's statement, in which he said he met with Metherell after his second meeting with Shepherd on April 9. Hazzard told the Commission that Metherell's intention was to resign. This was confirmed at a meeting the following morning when Metherell produced his letter of resignation. See Hazzard statement, 81.

⁶⁰ *ibid*, 64.

⁶¹ Moore, transcript, 552.

⁶² *ibid*; Greiner transcript, 695.

⁶³ Moore, transcript, 552.

⁶⁴ *ibid*, 553.

Whilst the disclaimers offered by Greiner, Moore and Hazzard were clear, Metherell's evidence was somewhat more ambiguous. Like the others, he said that no deal had been done. However Metherell told the Commission that his resignation depended upon him achieving what he called his "non-negotiables".⁶⁵ This involved: (1) his appointment to a creative and constructive position within the Public Service; (2) reassurances from Greiner regarding his future if the EPA secondment did not work out; (3) employment for his staff; and (4) the satisfactory resolution of his legislative program.⁶⁶

In relation to the first, Metherell, supported by Hazzard and Moore, told the Commission that he was not interested in just any Public Service appointment. His desire was for a meaningful and creative position, rather than one which involved "plucking the hairs from caterpillars".⁶⁷ Metherell, Greiner, Moore and Hazzard all told the Commission that a number of options had been discussed before it was agreed that he would be appointed to the EPA.⁶⁸ Metherell said he had sought and received assurances from the Premier that if the EPA secondment did not work out, he would be able to return to the Premier's Department.⁶⁹ However Greiner's recollection of these conversations was somewhat different. He told the inquiry that he had made no specific promises to Metherell, other than that he would be able to apply for other positions.⁷⁰ Metherell said his belief that there was a "safety net" for him was confirmed during a telephone conversation he had with Greiner from Vanuatu.⁷¹ He said they had agreed that he would stay at the Premier's Department, working on EPA matters. The understanding, according to Metherell, was that when the EPA job was advertised he could apply for it. Metherell told the Commission he agreed to the proposal, knowing that the EPA position

⁶⁵ Metherell, transcript, 190, 202-3.

⁶⁶ *ibid*, 177-8, 190-1, 208, 219.

⁶⁷ *ibid*, 246.

⁶⁸ See, for example, Metherell evidence, transcript, 246-7; Moore evidence 548; and Greiner statement, 87.

⁶⁹ Metherell, transcript, 218-9.

⁷⁰ Greiner, transcript, 685-6.

⁷¹ Metherell, transcript, 218-9, 221-3.

had been ruled out and that effectively he would stay at the Premier's Department.⁷²

Metherell told the Commission that he had also received assurances from Greiner that his staff would be looked after.⁷³ Likewise his legislative package was addressed. Four bills were involved.⁷⁴ During cross-examination Metherell told how he had realised that neither the Wilderness Bill nor the Nattai Bill would be passed.⁷⁵ However he did gain some reassurances from Greiner regarding the Garigal Bill and the Environmental Education Bill. In fact on the day Metherell resigned from Parliament the Education Bill passed the Lower House and the Garigal Bill reached committee stage.⁷⁶

The Timber Industry (Interim Protection) Bill

Whilst the four bills which made up Metherell's legislative package were significant in terms of his own motivation, there was no suggestion of impropriety attached to them. That was not the case with the Timber Bill, however. Whilst all witnesses denied any impropriety over the Bill, the Government's credibility appeared to be damaged when Metherell told the Commission that the Premier had telephoned him at home on March 9, during negotiations over the Timber Bill. He said that during the course of the conversation the Premier had advised him of the

⁷² *ibid*, 222-23.

⁷³ Metherell told the inquiry that he had sought and received some assurances from Greiner regarding the future of his staff. Moore had also offered a solution to this problem, saying that Metherell could take his secretary with him to the EPA, while he would appoint a second to a temporary position within his own office. See transcript, 61. Two were ultimately picked up by the new member for Davidson, Andrew Humpherson, whilst the third resigned as Metherell had expected would be the case.

⁷⁴ Metherell's legislative program involved four bills. They were: (1) the Wilderness Declaration of New Areas Bill; (2) the Garigal National Park Extension Bill (3) the Environmental Education Bill; and (4) the Nattai National Park Extension Bill. Metherell gave the impression that he was committed to achieving his legislative program before leaving Parliament. He said that through late March and early April he was particularly concerned that the Environmental Education Bill be passed.

⁷⁵ He had resigned himself to the fact that the Wilderness Extension Bill would not be passed, given that it was not supported by either the Government or the Opposition, and that he would not succeed in removing the depth limit on the Nattai National Park.

⁷⁶ Metherell said that under his agreement with the Government both bills were expected to be passed that day, but the Garigal bill was blocked by the Labor Party which wanted further consultation with the Aboriginal Land Council which had responsibility for the area in question.

Government's position on the legislation and said that he would also consider Metherell's concerns. Metherell said he had asked the Premier to keep him informed, to which Greiner allegedly replied:

I will, but it would be helpful if you could support a compromise tomorrow. It would also be helpful in resolving the other matter we've been talking about.⁷⁷

Metherell told the inquiry that he believed "the other matter" being referred to was the job.⁷⁸ Under cross examination, Metherell said that while the remark was "not to the Premier's credit", he did not regard it as improper.⁷⁹ He also told the inquiry that it had not influenced his vote.⁸⁰ Later, when examined by his own barrister, David Rofe QC, Metherell agreed it was part of the proper political processes for him to be able to negotiate with the Government to achieve as much of his legislative agenda as was practically and reasonably possible.⁸¹

Metherell's evidence appeared potentially damaging to the Premier, who had not mentioned the telephone conversation during the lead-up to the inquiry or in his written statement to the Commission. Even during cross examination he had no recollection of having made the telephone call or its content. However he was ultimately forced to concede that it did take place when a telephonist recalled putting the call through to Metherell's home. Nevertheless, Greiner sought to play down the significance of the Timber Bill. He said that politically the Government was in a win-win position over the legislation.⁸² He said that at no time did he assume Metherell would support the Bill, although he conceded that the support of either the Independents or the Opposition was necessary for the legislation to pass.⁸³ Greiner said that on the Monday (March 9) he had

⁷⁷ Metherell, transcript, 113.

⁷⁸ *ibid*, 316-17.

⁷⁹ *ibid*.

⁸⁰ *ibid*, 114.

⁸¹ *ibid*, 441.

⁸² Greiner, transcript, 655.

⁸³ *ibid*, 656.

assumed the Bill would pass and, given the nature of the compromise reached with Metherell, it would have Opposition support as well.⁸⁴

Greiner also continued to argue that his role in the appointment was minor.⁸⁵ Whilst Greiner conceded that he had played a decision-making role by: (1) initiating the preselection process; (2) approving the creation of the EPA position; (3) being involved in the planning and (4) in a qualified sense by not exercising the blackball; he said that in his own mind the only initiative he took was to say that any job Metherell was to be offered after he approached the Government was one for which he was qualified.⁸⁶

For his part, Moore also appeared keen to deflect the focus from the Premier. During the inquiry, he reiterated earlier statements that he accepted full responsibility for the decision and confirmed that the Premier's role was minor.⁸⁷ Moore denied that the appointment involved impropriety or illegality on his part or that of the other witnesses. He also announced that he would be resigning from Parliament before the next election.⁸⁸

Closing submissions

Whilst the evidentiary stage of the inquiry was heard in public, the final submissions were received in private. Temby opted for this course under s31 of the ICAC Act (see Appendix C). In so doing, he cited the public interest as a key element in his decision.⁸⁹ He also expressed concern that in previous inquiries closing submissions, particularly those of counsel assisting, had been interpreted as a precursor to the Commission's Report

⁸⁴ *ibid.*, 658.

⁸⁵ *ibid.*, 676.

⁸⁶ *ibid.*, 676-7.

⁸⁷ Moore, transcript, 591. See also T. Moore, media release, April 23, 1992.

⁸⁸ Moore, statement, 65-66.

⁸⁹ Temby, transcript, 943-5.

on the matter being investigated.⁹⁰ Temby's decision was generally supported by counsel for the various witnesses.⁹¹

Whereas much of the public session was involved with fact finding and the cross examination of witnesses, closing submissions focused on the requirements of the ICAC Act, particularly sections 7, 8 and 9. Under s7(1) conduct is corrupt if it meets the requirements of s8(1) and/or (2) of the Act, but is not excluded by s9. According to s8(1), corrupt conduct is:

- (a) any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official, any group or body of public officials or any public authority; or
- (b) any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions; or
- (c) any conduct of a public official or former public official that involves or constitutes a breach of public trust.

The types of conduct which are considered to be corrupt under the Act are outlined in s8(2) (see Appendix C). However conduct is not corrupt unless it satisfies s9. Under s9(1), conduct does not amount to corrupt conduct unless it could constitute or involve:

- (a) a criminal offence; or
- (b) a disciplinary offence; or
- (c) reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official.

In his submission, Clark argued that the conduct of Greiner, Moore, Metherell, Hazzard and Humphry was corrupt within the meaning of s8.⁹² He argued that Metherell's offer to resign as a Member of Parliament in return for a public service appointment constituted corrupt conduct

⁹⁰ *ibid*, 939.

⁹¹ Although note the comments by Chester Porter on behalf of Moore (transcript, May 25, 1992, 934-5) and Peter McClellan on behalf of Hazzard (transcript, May 25, 1992, 937).

⁹² Clark, transcript, May 27, 1992, 29.

within the meaning of s8(1)(a).⁹³ That is, it was conduct which could have adversely affected, directly or indirectly, the honest and impartial exercise of the official functions of Greiner and Moore as ministers and Humphry as director general of the Premier's Department.⁹⁴ Clark submitted that Metherell's conduct, both in approaching Hazzard and then in negotiating his departure with Greiner and Moore, was corrupt.⁹⁵ He argued that Hazzard had initiated the events by participating in meetings and negotiations to achieve the end being sought by Metherell, namely his resignation in return for a job.⁹⁶ As such it satisfied s8(1)(a) in that it could have adversely affected Greiner, Moore and Humphry in the honest and impartial exercise of their official functions, both with respect to the creation of the SES position and the appointment of Metherell to it.⁹⁷

Clark submitted that the conduct of Greiner and Moore was corrupt within the meaning of s8(a), (b) and/or (c). He said their conduct in negotiating the deal could have adversely affected the honest and impartial exercise by Humphry of his official functions.⁹⁸ Specifically, Clark referred to the meeting on April 9 at which Greiner and Moore conveyed their desire to Humphry that Metherell be appointed to the position and that a way be found by which that could be achieved.⁹⁹ He said that Humphry faced a number of competing obligations which he had to reconcile, including his responsibilities as head of the public service on the one hand, and his obligations to Greiner as his minister on the other.¹⁰⁰ Furthermore, Clark argued that the conduct of Greiner and Moore in seeking to appoint Metherell directly to the SES was contrary to the spirit of the PSM Act and thus satisfied the requirements of s8(1)(b) and (c).¹⁰¹

⁹³ *ibid*, 37-38.

⁹⁴ *ibid*.

⁹⁵ *ibid*, 39.

⁹⁶ *ibid*.

⁹⁷ *ibid*, 38.

⁹⁸ *ibid*, 39.

⁹⁹ *ibid*.

¹⁰⁰ *ibid*, 61.

He submitted that their conduct satisfied the requirements of s8(1)(b), that is it constituted or involved a partial exercise of their own official functions, because Metherell was shown favouritism. This favouritism was revealed in two ways: (1) through the creation of a job to meet Metherell's specifications; and (2) by urging Humphry to recommend Metherell's appointment.¹⁰² Not only that, but they showed this favouritism in return for political advantage, namely the vacancy caused by his resignation.¹⁰³ This also satisfied s8(1)(b) and (c). With respect to 8(1)(c), Clark argued that the public had a right to expect that such positions would be filled without favouritism.¹⁰⁴ That is, it would be filled in an open, orthodox way which could be subjected to independent scrutiny. However he claimed that did not happen in this case and therefore there was a breach of trust under s8(1)(c).¹⁰⁵ He said there was a further breach of trust and hence sense in which s8(1)(c) was satisfied. That had to do with the ministerial code of conduct (See Appendix D) which Clark argued Greiner and Moore had breached:

We say that was a document brought in by them. It was a document that was promulgated by them, and it was a document that they said that they would stand or fall by. That is, that there was a document that set the standards by which they would aspire to, and the public were entitled to assume that from thereafter ministers' conduct could be judged by that standard and that failure to comply with that standard is a breach of the trust that the public were entitled to place in them that they would honour that standard.¹⁰⁶

Clark also agreed with a proposition put forward by Temby that their conduct could not be described as impartial because it involved, at least on Moore's part, the helping of a friend.¹⁰⁷ There was also the knowledge on the part of the others that friendship was a motivating factor for Moore. Further, he submitted there was partiality in the decision to grant the appointment without interview and he argued that there was an

¹⁰¹ *ibid*, 39.

¹⁰² *ibid*, 40.

¹⁰³ *ibid*.

¹⁰⁴ *ibid*.

¹⁰⁵ *ibid*.

¹⁰⁶ *ibid*, 41.

¹⁰⁷ *ibid*, 42.

element of personal political advantage involved, given that Greiner was the Premier and Moore a minister.¹⁰⁸

Dealing with Humphry's role, Clark contended that his conduct likewise satisfied the requirements of s8(1)(b) and (c).¹⁰⁹ He argued that Humphry had failed to act impartially when he advised Greiner and Moore that Metherell could be appointed to the SES:

This advice was partial because it constituted favouritism to Dr Metherell, was contrary to at least the spirit of the PSM Act and Mr Humphry's own guidelines as to selection and appointment.¹¹⁰

He also disputed Humphry's claims that he had engaged in the mental gymnastics required to assess Metherell's suitability for the position during the meeting with Greiner and Moore on April 9. Instead, he said that Humphry had fallen into the trap of seeking to "reconstruct" the events so as to justify his conduct on that particular day.¹¹¹

Clark went further and submitted that the conduct of Greiner, Moore, Metherell, Hazzard and Humphry constituted bribery under s8(2)(b) of the Act.¹¹² S8(2) provides:

Corrupt conduct is also any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the exercise of official functions by any public official, any group or body of public officials or any public authority and which could involve any of the following matters:

(b) bribery.

According to Clark's submission, there are five elements to the offence of bribery. They are: (1) the conferring of an undue reward or advantage; (2) a corrupt intention on the part of the giver to influence the receiver; (3) the receiver performing a public function; (4) the giving of a reward

¹⁰⁸ *ibid.*

¹⁰⁹ *ibid.*, 43.

¹¹⁰ *ibid.* By Humphry's own guidelines, Clark was referring to a manual which accompanied the PSM Act which Humphry had prepared as an aid to interpretation for CEO's.

¹¹¹ *ibid.*, 25-27.

which must be intended to influence the receiver in the performance of his public function; and (5) the intention must be to induce the receiver to act contrary to the known rules of honesty and integrity.¹¹³

According to Clark, a reward or advantage could be anything of value to the person being bribed. He submitted that Metherell's offer of resignation was of benefit to Greiner and Moore and conferred on them a reward or advantage to which they were otherwise not entitled.¹¹⁴ Anticipating the responses of counsel for the witnesses, Clark rejected the argument that: (1) Metherell was entitled to resign whenever he chose; and (2) therefore his resignation could not be construed as a reward.¹¹⁵ He said the reality was that Metherell would not have resigned had it not been for the assurance of an appointment.¹¹⁶ In relation to the second element, Clark submitted that Metherell offered to resign so that Moore and Greiner would show favouritism to him in the creation of the SES position and his appointment to it.¹¹⁷ Furthermore, the third element was satisfied because Greiner and Moore were both performing a public function as Premier and Minister respectively and it was in that capacity that the offer of resignation was made to them.¹¹⁸ Dealing with the fourth element, he said the offer must have been intended to influence Greiner and Moore to create a position according to his [Metherell's] specifications and to favour him by appointing him to the position.¹¹⁹ Finally, and in relation to the fifth element, Clark submitted that the test is objective, and in this case the benchmark for honest and impartial conduct is provided by the PSM Act.¹²⁰ This precluded a direct ministerial appointment.¹²¹

¹¹² *ibid.*, 47.

¹¹³ *ibid.*, 53.

¹¹⁴ *ibid.*, 53, 55.

¹¹⁵ *ibid.*, 54.

¹¹⁶ *ibid.*

¹¹⁷ *ibid.*, 56.

¹¹⁸ *ibid.*

¹¹⁹ *ibid.*

¹²⁰ *ibid.*

¹²¹ *ibid.*

Satisfying s 9

Given this, he argued, the conduct of Greiner, Moore, Metherell, Hazzard and Humphry satisfied the requirements of s9 because it could constitute a criminal offence.¹²² In the case of Hazzard and Humphry, Clark argued that their conduct satisfied s9(1)(a) because it was consistent with “the general principles of aiding, abetting, counselling or procuring the commission of an offence,” and as such they were accessories to the offence.¹²³ He said Hazzard was aware that Greiner and Moore intended to appoint Metherell directly to the SES in return for his resignation and that they would take whatever steps were necessary to achieve that end, including showing him favouritism in the two senses highlighted previously. With that knowledge, Hazzard continued to participate in the events.¹²⁴

Clark was particularly critical of Humphry, arguing that despite his competing obligations he went along with Greiner and Moore’s wishes:

He knew that the appointment to the EPA job could not be done, and he knew that he had a position which had not been formally created, which had not been designed as an EPA job, which had not been designed for Dr Metherell, but in our submission was prepared to distort and in that way totally ignore all his own guidelines, all his own recognised procedures of honesty and integrity and effect the political will of those ... who employed him.¹²⁵

Whilst he did not submit that the conduct of any of the witnesses could involve a disciplinary offence under s9(1)(b), he did contend that a case could be made out against Greiner and Moore under s9(1)(c).¹²⁶ That is, there were reasonable grounds for dispensing with their services as Premier and minister respectively.¹²⁷ He said this could be achieved through s35E(2) of the *Constitution Act* which provides that ministers

¹²² *ibid*, 57.

¹²³ *ibid*.

¹²⁴ *ibid*.

¹²⁵ *ibid*, 61.

¹²⁶ *ibid*, 65.

hold office at the Governor's pleasure.¹²⁸ Whilst he conceded that the political realities would render it unlikely that such a course of action would happen, it was nonetheless legally possible.¹²⁹ He did not make such a recommendation in relation to Humphry, however, pointing out the irony of the situation - namely that any decision to dispense with his services would have to be made by Greiner, the political master whose bidding he was doing.¹³⁰ Nor did he so recommend in relation to Hazzard. However he did submit there were grounds for Metherell's services to be dispensed with under s9(1)(c) given the extent to which his appointment was "tainted".¹³¹

Dealing with the Timber Bill, Clark submitted that Greiner's comments to Metherell during their March 9 telephone conversation could not be regarded as corrupt under the Act. He said there was reasonable doubt that the Premier uttered the words with any corrupt intention.¹³² Nor could it be concluded, he said, that Metherell's changed position on the Timber Bill between March 6 and 10 constituted corrupt conduct. According to Clark, Metherell's change of mind was consistent with the compromises that were reached and the political realities of the time.¹³³ In fact he said Greiner should be given the benefit of the doubt because a number of interpretations of the conversation were possible, including a suggestion from Temby that his words were consistent with his belief that it was necessary to give a public impression that relations between them had improved.¹³⁴

Clark also said that Greiner and Hazzard's placing of the first meeting between the Premier and Metherell as March 17 could not be construed as corrupt. He said there was no evidence that either man deliberately

¹²⁷ *ibid*, 66.

¹²⁸ *ibid*.

¹²⁹ Clark, closing submissions, 69.

¹³⁰ *ibid*, 71.

¹³¹ *ibid*, 71-72.

¹³² Clark, written submission, 4.

¹³³ Clark, closing submission, 35

¹³⁴ *ibid* 33.

sought to mislead the Commission.¹³⁵ Finally, he contended that whilst Greiner and Moore sought to reassure Metherell over his staffing and wilderness concerns, he was not convinced that that constituted corrupt conduct within the meaning of the Act.¹³⁶ Despite that, however, in summing up he argued that the Commission include in its report a recommendation that consideration be given to: (1) the prosecution of Greiner, Moore, Metherell, Hazzard and Humphry on the common law offence of bribery; (2) the taking of action against Greiner and Moore as Premier and Minister respectively; and (3) the dispensing of Metherell's services within the SES.¹³⁷

The responses to Clark's submission

Clark's submissions caught other counsel by surprise. Their reactions were summed up by Roger Gyles QC: "... there were a few jaws that hit the table because it just wasn't a way we had ever thought about the case".¹³⁸ Counsel for Greiner, Moore, Metherell, Hazzard and Humphry all rejected Clark's submission. They argued that the conduct of all witnesses was not corrupt, but rather was consistent with political practice and the realities of the situation in which the Government found itself. Counsel reiterated the arguments put by all witnesses during the evidentiary stage that there was an expectation on the part of all involved that the appointment would be to a position for which Metherell was qualified. This view was summed up by counsel for Metherell, John Agius, who said of his client: "[t]he whole basis of his activity ... was that he wanted a proper job, a job which everybody knew was going to have to stand up to inspection."¹³⁹ Agius said there was no evidence during cross-examination that Metherell believed anybody would act illegally:

He believed at all times that Greiner and Moore also regarded him as a person eminently qualified for the job. He didn't want some specially created political position; he wanted a job which would

¹³⁵ *ibid*, 33-34.

¹³⁶ *ibid*, 35.

¹³⁷ *ibid*, 73.

¹³⁸ Gyles, closing submissions, 236.

¹³⁹ Agius, closing submissions, 99.

stand on its own legs, and he believed he was qualified for such a job, but he was encouraged in knowing that other people believed that too; a point telling against any suggestion that he had an expectation that these people would ... not act impartially or honestly.¹⁴⁰

Agius also argued that whilst the appointment process was unorthodox, it was never intended to be secretive.¹⁴¹ He said there was always going to be a public announcement. Other counsel also disputed Clark's argument that the appointment was in breach of the spirit and/or the intention of the PSM Act. Porter, for example, denied that Moore had "knowingly subverted the mechanism of the Act".¹⁴² He also rejected the proposition that there could be an offence based on a contravention of the spirit of the Act:

[T]here's nothing illegal or improper or wrong for a minister to say, 'I want to do this. I understand I can't do it this way. Is there another way in which I can do it?' And if he's told another way which turns out to be wrong, he's not guilty of improper conduct. In our submission the other way he was told was perfectly correct.¹⁴³

Counsel argued that each of the witnesses believed the mechanism adopted was legal and that the solution provided by Humphry was correct, albeit unorthodox. It was argued that there was no evidence the main requirements of the Act - that the position be advertised [s31] and that the appointment be based on merit [s26(1)] - had not been complied with.¹⁴⁴ In defence of Humphry's role it was argued that the task of the departmental head in determining the suitability of an applicant was a purely subjective one.¹⁴⁵ According to Gyles: "... provided that sections 31 and 26 are complied with, it matters not that the winning candidate was proposed by a minister or head-hunted by the permanent head".¹⁴⁶ McClellan, for Humphry, argued that his client's actions in appointing

¹⁴⁰ *ibid.*, 100.

¹⁴¹ *ibid.*, 113.

¹⁴² *ibid.*

¹⁴³ Porter, closing submissions, 193.

¹⁴⁴ Gyles, closing submission, 232.

¹⁴⁵ *ibid.*

¹⁴⁶ *ibid.*

Metherell by way of a generic advertisement and then secondment were consistent with the philosophy of the Act.¹⁴⁷

A question of political advantage

All counsel rejected Clark's primary argument that political advantage was the major motivating factor behind Metherell's resignation from Parliament and appointment to the SES. Agius argued that Metherell never offered a political advantage to Greiner or Moore and that in so contending Clark had confused consequence and intention.¹⁴⁸ He said: "It may have been a consequence of what it was that he was offering that people elsewhere reasonably perceived a political advantage. But he never offered that."¹⁴⁹ Extending his defence to the actions of the government, Agius said there was no evidence that political advantage was part of the negotiations:

The fact was that they gained a political advantage but you can't tie all the motives and intentions together as though everybody held the same motive and intention at the same time, look at the consequences and say therefore something is wrong.¹⁵⁰

He said Metherell's motivation in leaving Parliament was entirely personal. This was supported by others, including Lionel Robberds QC, for Hazzard, who argued that political advantage was a bonus rather than a motivating factor.¹⁵¹ Porter agreed, submitting that on a number of occasions Moore had denied that political advantage was the dominant motivating factor. Porter said that Moore was influenced by a number of motives. The first was his friendship with Metherell, and his concern that he was "turning in on himself and destroying himself".¹⁵² However he said that this did not mean he was showing favouritism or nepotism:

¹⁴⁷ He pointed specifically to s15(2) of the Act which provided for the creation of a pool of talent from which the SES could be formed. See final submission, 272.

¹⁴⁸ Agius, closing submission, 107-8, 111.

¹⁴⁹ *ibid*, 107.

¹⁵⁰ *ibid*, 122.

¹⁵¹ Robberds, closing submission, 162-3.

¹⁵² Porter, closing submission, 185.

It would only be favouritism or nepotism if it was carried to the extent where the appointing minister said: 'regardless of whether he is the best available person or not I'm going to appoint him.' That's favouritism.¹⁵³

Porter said that at all times Moore believed Metherell was the best person available. He also rejected the political advantage argument on another ground too. Moore, he argued, did not believe that the situation in the Legislative Assembly was unworkable. As leader for the Government in the House he had established a rapport with the Independents:

To him there was no necessity to achieve the resignation of Dr Metherell. It was ... so far as he was concerned ... an incidental bonus. He was undoubtedly desirous that the electors of Davidson who felt, rightly or wrongly, that they had been misled, should be given another opportunity, but that's not a motive that is in any way corrupt or wrong.¹⁵⁴

This point was picked up by Gyles, who argued that whilst Metherell's resignation did ultimately work to the benefit of the Government in that they won the Davidson by-election, there was no guarantee that would be the case. He said there were a number of instances in which similar plans had gone awry.¹⁵⁵ Gyles also sought to distinguish between a party political advantage on the one hand and a purely personal advantage on the other. He said that in this instance the advantage was party political, "not a personal advantage in any sense".¹⁵⁶

Porter argued that Moore's primary motive "was that Dr Metherell's desire to leave Parliament happened to click in with a plan that he had for a long term planner and provided him with the ideal appointee".¹⁵⁷ He pointed to the March 18 letter from Moore to Greiner in which he sought approval to establish the position and the fact that it had been framed to allow for an orthodox appointment (see Appendix E).¹⁵⁸ This would enable Moore to proceed with his plans to fill the position in an

¹⁵³ *ibid.*

¹⁵⁴ *ibid.*

¹⁵⁵ Gyles, closing submission, 235.

¹⁵⁶ *ibid.*, 238.

¹⁵⁷ Porter, closing submission, 186.

orthodox manner in the event Metherell decided not to take it up.¹⁵⁹ He also reiterated the argument which Moore had been putting throughout the controversy: that he would not have appointed Metherell unless he considered him the best man for the job.¹⁶⁰ Accordingly, Porter was critical of Clark's argument that the "position was set up or designed or otherwise made for Dr Metherell".¹⁶¹ Porter described this claim as "very much a half truth if a truth at all".¹⁶²

Agius argued that political advantage of itself cannot be considered improper. To understand this, he said it was necessary to look at the parliamentary process and the role of government. Further, he argued that governments receive a mandate to govern and that this right is acknowledged by the Independents through the agreements they sign. He said that Metherell's non-negotiables should be understood in this context. They were "part of the ordinary political process" which he described as one of compromise.¹⁶³

Bribery rejected

It was this "nature of politics" argument that counsel relied on to reject Clark's submission that the conduct of their clients amounted to common law bribery. Porter argued:

[I]t has certainly been said a number of times during this commission that the whole art of politics and particularly in a house on a knife edge balance such as the present Legislative Assembly, is the trading of political advantages, and that is politics.¹⁶⁴

Porter agreed with Agius' submission that the delivery or offer of political advantage by resignation could not amount to bribery because it did not

¹⁵⁸ *ibid.*

¹⁵⁹ *ibid.*

¹⁶⁰ *ibid.*, 187.

¹⁶¹ *ibid.*, 186.

¹⁶² *ibid.*

¹⁶³ Agius, final submission, 110.

¹⁶⁴ *ibid.*, 189.

constitute the performance of public office.¹⁶⁵ Agius had argued that whilst MPs have an official function when sitting in Parliament, that does not extend to the right to resign their seat whenever they choose: "... the act of resignation itself is really not such that can be bought ... because you're not exercising any kind of official duty".¹⁶⁶ He said that under common law bribery there was a requirement that there be real consideration:

It has never been suggested - and you will look long and hard and never find a case - which suggests that political advantage could answer the common law requirement of consideration.¹⁶⁷

Gyles took this argument further to submit that if the offer of political advantage is capable of being a reward or a consideration for the purposes of common law bribery: "then it must follow that where political advantage is traded for political advantage, then all other deals ... are really all of the same character", [that is corrupt]. Gyles rejected this proposition, but pointed to a number of examples, including the Government's arrangement with Windsor, the historical coalition arrangement between the Liberal Party and the National Party, the Greiner Government's agreement with the three non-aligned Independents¹⁶⁸ and even inter-factional deals, to illustrate how Clark's argument failed to take into account the realities of politics.¹⁶⁹

Both Porter and Gyles also rejected Clark's submission that their clients' conduct amounted to a breach of the ministerial code of conduct and thus could be interpreted as a breach of trust under s8(1)(c) of the ICAC Act. Gyles accused Clark of seeking to deny ministers the opportunity to take party-political considerations into account when exercising their duties: "It is absurd to suggest that in exercising their functions they may not act for the plainest of party political purposes. That is what they are elected to

¹⁶⁵ Porter, final submission, 190.

¹⁶⁶ Agius, final submission, 105.

¹⁶⁷ *ibid*, 106.

¹⁶⁸ Gyles, final submissions 228.

¹⁶⁹ *ibid*, 240.

do.”¹⁷⁰ Accordingly he said that Greiner was justified in taking the stability of the government into account when considering his actions, although he acknowledged that in so doing, the Premier was not permitted to break the law or to act corruptly within the meaning of s8.

Gyles and Porter likewise rejected Clark’s submission that the conduct of Greiner and Moore amounted to a criminal offence under s9(1)(a) or was such as to warrant the termination of their services as Premier and Minister respectively under s9(1)(c). They argued that s9(1)(c) only applied in the case of a master-servant relationship and that did not describe the situation involving ministers, who held office at the pleasure of the Governor, as Clark had indicated.¹⁷¹ Gyles warned that if s9(1)(c) was extended to apply to ministers, there would be: “no limitation upon the conduct which the commission could find was corrupt, provided it was encompassed by s8”.¹⁷² Gyles argued:

In the circumstances of this case it is unthinkable that it would be reasonable to dismiss for anything short of conduct within 9(1)(a) where the crime is of sufficient gravity and the circumstances serious. If there is a finding of corrupt conduct by reason of common law bribery we submit that would not even justify dismissal where what was done was in accordance with decades of precedent. If the ground rules are to be changed or the goal posts moved ... so be it, but it would not be reasonable to in effect punish retrospectively.¹⁷³

This was a major concern for Gyles, Porter and McClellan in particular. Gyles and McClellan both reminded Temby of Greiner’s own comments during his second reading speech on the ICAC Act when he said that the Commission was not intended to become a tribunal of morals.¹⁷⁴ Gyles argued that the effect of s9 was to:

[E]nsure that corrupt conduct within the meaning of the Act does not exceed the boundaries of the law as it stands at the time of the investigation and that it is to be judged by established and ascertainable criteria. ... It’s to ensure that there are no new categories

¹⁷⁰ *ibid*, 233.

¹⁷¹ *ibid*, 209.

¹⁷² *ibid*, 210.

¹⁷³ *ibid*, 246.

¹⁷⁴ Gyles, final submission, 208; McClellan, final submission, 286.

created. We submit that this is the safeguard against arbitrary and idiosyncratic standards being applied by an inquisitor not subject to appeal.¹⁷⁵

He went on to argue that the Commission had been given statutory powers that would enable it “to discover and expose conduct known to be wrong by existing standards”.¹⁷⁶ Gyles’ concern was that Temby would apply subjective criteria when considering the conduct of Greiner, Moore, Metherell, Hazzard and Humphry, rather than the objective standards provided for under the Act. This also appeared to be a concern held by Porter who reminded Temby that his inquiry was in two parts and that it was not for him to use the first part of the inquiry to comment on the appropriateness of particular behaviour:

[W]hatever you think are the desirable standards, that’s a matter for the second part of your report [inquiry]. We are entitled to be judged by the standards as they are now. [And while] ... there have been standards as to appointments in the past going back many years to suddenly say of someone now, ‘well, you’re not entitled to do that because this is what I think ought to be the standards’ would be wrong.¹⁷⁷

These concerns were highlighted in an exchange between Temby and Gyles. Gyles had referred to “the movement of political consciousness and public opinion as to what is and what is not within or outside the pale” and suggested that the Commission should not form a judgment about it.¹⁷⁸ However Temby argued that the ICAC Act formed part of that “evolving consciousness” and in so doing provided a clue to his subsequent report.¹⁷⁹

Conclusion

Whilst Greiner, Moore and Metherell had initially welcomed the prospect of an ICAC inquiry as an opportunity to clear their names, at the

¹⁷⁵ *ibid*, 207.

¹⁷⁶ *ibid*.

¹⁷⁷ Porter, final submissions, 190.

¹⁷⁸ Gyles, final submission, 228.

¹⁷⁹ Temby, transcript, 228.

end of the formal hearing they may well have been regretting that early show of enthusiasm. The ICAC inquiry offered Greiner and Moore in particular some protection from the party-political antagonisms to which they would have been subjected during a select committee investigation. In that regard they were also aided by Temby's decision not to allow the Leader of the Opposition a right to be legally represented at the inquiry. But in all other respects they were vulnerable. They were particularly vulnerable on two fronts: (1) the way in which the ICAC inquiries were conducted, which was like a quasi court; and (2) the particular requirements of the ICAC Act which applied its own definition of 'corrupt conduct' to behaviour.

The latter, in particular, made the task of defending their conduct especially difficult. During the public sessions, all of the key witnesses emphasised that the appointment was part of politics. This was highlighted by the disavowals of corruption, impropriety, illegality or immorality, both individually and collectively on their part. It was also confirmed in the tendency of Greiner and Moore, in particular, to argue that their conduct was no different from that which had been typical of administrations before them. This is in line with the situational morality argument proposed by Chibnall and Saunders .

Accordingly, it is easy to understand their surprise - and that of counsel - when during final submissions, counsel assisting the Commission argued that their conduct was not only corrupt within the meaning of the Act, but also amounted to common law bribery. In taking this approach, Clark was effectively formalising the allegations the Opposition had made during the censure motion against Greiner and Moore on April 28. In seeking to rebut Clark's arguments, counsel for Greiner and Moore in particular introduced an argument which would become the mainstay of the Government's defence once the First Report was released - that the Premier and Moore should be judged by existing standards, not freshly created ones.

The differences between Clark's closing submission on the one hand and that of counsel for Greiner, Moore, Metherell, Hazzard and Humphry on the other highlights the definitional difficulties discussed in chapter two and particularly the possibility that a formal legal definition can be at odds with popular conceptions of conduct. Thus not only does this chapter support Chibnall and Saunders' argument that individuals who seek to apply a situational morality when justifying their conduct in a formal-legal arena struggle to do so, but it also reinforces the arguments of McGraw, Bennett and Dyer: That is, whilst blame avoidance strategies are intended to help extricate an individual from a predicament, they can also work against them. That was clearly the case during the ICAC inquiry. Whilst the witnesses sought to justify their conduct by using a nature of politics argument, the motives and justifications arguments which they offered were rejected by counsel assisting.

The difficulty confronting Greiner and Moore in particular was further highlighted in Clark's suggestion that consideration be given under s9(1)(c) of the Act to their dismissal as Premier and Minister respectively – and the reactions of counsel thereto. This problem is further revealed by the findings of the Commission's first report and the responses thereto. It is to that which the thesis now turns.

Chapter 6

The report and its political consequences

Introduction

To date the thesis has highlighted the difficulties Greiner and Moore experienced when seeking to justify their behaviour. As the discussion in chapters four and five suggested, they struggled to convince their political opponents in the immediate aftermath of the appointment, and they failed to convince counsel assisting the ICAC during the formal inquiry stage. This left counsel representing the various witnesses in a position whereby they were forced to rebut the allegations of corruption which had been mooted by the Opposition (see chapter four) and formalised by Clark during the inquiry stage (see chapter five).

This chapter takes the analysis one step further by looking at the ICAC's findings in its first report, the responses thereto (from the various witnesses, and others including the Opposition and non-aligned Independents), the Court of Appeal hearing and decision, and the resignations of Greiner and Moore, initially as Premier and Minister, and ultimately as Members of Parliament. It will be argued that the findings handed down by the ICAC and the responses thereto, including the decision of Greiner and Moore to appeal to the Supreme Court, confirm the problems discussed in chapter two – namely the difficulties involved in reaching agreement over the labelling of conduct as corrupt or not corrupt. However this chapter highlights the issue from another perspective. It shows how even the application of so-called objective standards (in this case the provisions of the ICAC Act) can be subject to human foibles, as the Court of Appeal decision found when overturning the finding against Greiner and Moore.

This chapter takes the discussion to another level in a separate sense. It shows how difficult it is to separate political outcomes from the labelling of conduct and discussions about motive. Whilst this was clearly a consideration in chapter four, particularly in relation to the Opposition's early response to the appointment, and in chapter five, it becomes even more pertinent in the post report period when the conduct has been labelled and the futures of Greiner, Moore and the Government are under scrutiny. Finally, the chapter will argue that at the end of the day the labelling of conduct can be influenced by a range of factors, particularly when political power (and thus the ability to determine the outcome) is held by a small number of people – in this case the non-aligned Independents.

Again, the focus will be on the various arenas in which this issue was fought out. In this phase there were multiple arenas, including the ICAC, the Parliament, the Supreme Court, the public and the media. In this phase the constraints imposed by the inquiry stage had been lifted (with the exception of the three days in which the Supreme Court sat to take evidence). The nature of the findings against Greiner and Moore in particular meant that the range of stakeholders has been increased. It also meant that any hopes the Government had of containing the issue, and particularly the consequences thereof, had almost dissipated.

'Corrupt' under the Act

Satisfying section 8 of the ICAC Act - Greiner and Moore

In the lead-up to the release of the report, Greiner and his staff developed a range of strategies depending on the Commission's findings.¹ Ultimately, the scenario was the worst possible for the Government. In his report Commissioner Temby found that under a strict reading of the ICAC Act both Greiner and Moore had acted corruptly in seeking to appoint Metherell to the Premier's Department and ultimately to the

¹ Sturgess, interview, December 17, 1992.

EPA position which they had created. He said that the "deal" to which they were party "... involved exchanging a Government job for a Parliamentary seat".² The consequence of this deal was a change in the balance of power in the Legislative Assembly, which he described as "a matter of profound importance to all citizens of this State".³ Temby found that Greiner and Moore's conduct was caught by sections 8(1)(a), (b), and (c) of the ICAC Act.

In particular he found that their conduct was partial [s8(1)(b)] in that Metherell was favoured over all other applicants for the Premier's Department position and potential applicants to the EPA position.⁴ He also concluded that their conduct involved a breach of public trust [s8(1)(c)], given that Metherell was appointed to the position for what Temby described as "extraneous reasons".⁵ These included: (1) Metherell's friendship with Moore, and (2) the political advantage which flowed to the Liberal Party with Metherell's resignation from the Parliament.⁶ He said that the Liberal Party's success in the subsequent Davidson by-election not only enhanced the Government's likelihood of staying in office, but also benefited Greiner and Moore.⁷ In relation to s8(1)(a), Temby concluded that the conduct of Greiner and Moore could have indirectly affected the impartial exercise of Humphry's functions as a public official.⁸

Like Clark, Temby refused to accept the Premier's argument that he had played a minor role in the Metherell appointment.⁹ In Greiner's favour, however, he dismissed the argument that the Premier had tried to solicit Metherell's vote on the Timber Bill during their telephone conversation on March 9, accepting that the Government was not desperate to ensure

² ICAC, *Report on Investigation Into the Metherell Resignation and Appointment* (Sydney: ICAC, June 1992): v. Hereinafter referred to as First Report. This was in line with the submission of Clark.

³ *ibid.*

⁴ *ibid.*, 53.

⁵ *ibid.*

⁶ *ibid.*

⁷ *ibid.*

⁸ *ibid.*

⁹ *ibid.*, 51.

that the legislation passed.¹⁰ He conceded the Government could gain political kudos if the legislation was defeated and the Opposition could be blamed for the loss of timber industry jobs. According to Temby:

The two men recognised, as did Moore and Hazzard, that if Metherell was to resign and take up a public service position that must be done in a credible manner, and hence a warming of relations between Greiner and Metherell had to become manifest. Greiner might well have been suggesting that if Metherell did in a principled manner move in the Government's direction, that would have the incidental advantage of being such a manifestation. Viewed in that way, what Greiner said as recorded in the Metherell diaries can be seen as suggesting something as a precursor to the lunch which we know happened on March 27.¹¹

Temby accepted that Moore was motivated by his friendship with Metherell, unlike Greiner, who simply did not want to see him blatantly disadvantaged by virtue of his previous relationship with the Government.¹² He also acknowledged that Moore had accepted responsibility for the appointment, and that the minister believed Metherell to be capable of the job.¹³ While he stated that Moore was "a generally impressive witness", he was critical of him for misleading Shepherd, arguing that the obligation of senior public servants to be frank and forthright with their ministers should be reciprocated.¹⁴ In fact Temby said Moore should have advised Shepherd that he had a person in mind for the position being created.¹⁵

Satisfying s8 – Metherell, Humphry and Hazzard

The Commissioner found that Metherell's willingness to resign from Parliament on condition that he would be appointed to a senior Public Service position could likewise be interpreted as satisfying s8(1)(a). He described Metherell as "a highly political animal" who knew that what he was offering to Hazzard, Moore and Greiner, namely the prospect of his

¹⁰ *ibid.*, 42.

¹¹ *ibid.*, 47.

¹² *ibid.*, 67, 74-5.

¹³ *ibid.*, 78.

¹⁴ *ibid.*, 48.

resignation, was "highly attractive to them".¹⁶ He also accepted that Metherell was seeking a "real job, not a sinecure"¹⁷ and to achieve that he was aware that the method of appointment would have to be "unorthodox".¹⁸

Temby described the circumstances surrounding the appointment as "exceptional".¹⁹ He said the fact that "an applicant for a SES position should be awarded it within hours after signing the application, without interview, and on the basis that it was given in exchange for the proffered resignation from Parliament" satisfied the requirements of s8(1)(a) of the ICAC Act.²⁰ That is, Metherell's willingness to resign in exchange for the SES appointment was conduct which "could and did adversely affect the honest and impartial exercise of official functions by public officials".²¹ The public officials in this instance were Greiner, Moore and Humphry.

While Humphry was in a different category to Greiner, Moore and Metherell, in that he was a public servant and the others were members of Parliament at the time the appointment was negotiated, Temby still found that his conduct satisfied the requirements of s8(1)(b). As with Greiner and Moore, Temby found that Humphry's role in the Metherell appointment was significant. In fact Temby acknowledged that without Humphry, Metherell "would not have got the job".²² According to Temby, Greiner and Moore had placed Humphry in an invidious position, in which he had to choose between his responsibilities as head of the Public Service and to the PSM Act on the one hand and his duties to his minister (in this case Greiner) on the other.²³ While he accepted that Humphry did not become involved in the process until quite late and was only told enough to enable him to ensure Metherell's

¹⁵ *ibid.*, 67

¹⁶ *ibid.*, 67.

¹⁷ *ibid.*, 68.

¹⁸ *ibid.*, 67

¹⁹ *ibid.*, 68

²⁰ *ibid.*, 68-9.

²¹ *ibid.*, 69.

²² *ibid.*, 80.

²³ *ibid.*, 87-88.

appointment, he nonetheless believed that Humphry had acted improperly.

According to Temby, Humphry had allowed his sense of duty to the Premier to override his other responsibilities. He said that while Humphry's solution to the problem facing Greiner and Moore may have been lawful, it was improper in that he had allowed Metherell to be favoured over other applicants for the Premier's Department position and potential applicants for the EPA position. Therefore, he concluded, Humphry was corrupt under s8.

Hazzard's conduct, on the other hand, was not categorised as corrupt within the meaning of s8. According to Temby, Hazzard's role in the Metherell appointment was somewhat different from that of Greiner, Moore and Humphry. Whereas Greiner and Moore were acting as Premier and Minister respectively, and Humphry as director general of the Premier's Department in facilitating Metherell's appointment to the SES, Hazzard was not acting in any official capacity.²⁴

The second test - section 9

Temby immediately discarded s9(1)(b), saying he was aware of no disciplinary offence which applied to ministers or members of Parliament.²⁵ Likewise, he dispensed with such a finding against Humphry, whom he said was simply doing the bidding of Greiner and Moore.²⁶ He said such action could only be initiated by Greiner and, given the circumstances of the case, the taking of such action would be inappropriate.²⁷ He also rejected Clark's submission that their conduct amounted to Common Law bribery and constituted a criminal offence under s9(1)(a).²⁸ Temby said there were a number of elements which had to be satisfied before conduct could constitute or involve a criminal

²⁴ *ibid*, 80.

²⁵ *ibid*, 54.

²⁶ *ibid*, 88.

²⁷ *ibid*, 54, 89.

²⁸ *ibid*, 89.

offence. They were that: (1) an undue reward be offered or received; (2) a corrupt intention accompany the offer; (3) the offer must be made in order to influence behaviour in public office; and (4) the offer be made with a view to inclining a public official to act contrary to known standards of honesty and integrity.²⁹

In relation to Metherell, Temby said that while his conduct satisfied elements (1) and (3), they did not meet (2) and (4). That is, while there was evidence that he had offered Greiner and Moore an undue reward or advantage, in the form of his unheralded resignation from Parliament, and that in so doing he had intended to influence them in the performance of their public duties, there was no evidence that his intention was corrupt or that he had intended them to act contrary to known rules of honesty or integrity.³⁰ According to Temby, such was Metherell's self esteem that he believed the people of NSW would benefit from his appointment to the public service.³¹ Significantly, Temby also said he did not believe that a notional jury would find that Metherell had intended to induce Greiner or Moore to act contrary to known rules of honesty and integrity. In a comment which was ultimately to attract the attention of the Court of Appeal, Temby said:

Whether one likes it or not, and acknowledging that the analogies are imprecise, what have been called "jobs-for-the-boys" are part of practical politics in this country. Probably they should not be, and that matter must be looked at in the second stage of the current inquiry. However at present I must take the situation as it is, not as it should be. A jury would be directed to consider the matter according to current and not ideal standards.³²

Accordingly, he said there was no evidence to support the argument that Metherell's conduct satisfied s9(1)(a).³³ Nor was he satisfied that Metherell's conduct met the requirements of s9(1)(c). In relation to s9(1)(c), Temby differentiated between Metherell's position and that of

²⁹ *ibid*, 55.

³⁰ *ibid*, 69.

³¹ *ibid*.

³² *ibid*.

³³ *ibid*.

Greiner and Moore, claiming that the former could only be considered as a member of Parliament, whereas the Premier and Minister were both members of the Executive:

Nothing he did would have warranted his expulsion from Parliament. The position would have been different if he had exchanged his vote for material advantage. That is a good example of grave misconduct which would have warranted his expulsion from Parliament which is a form of dismissal within the meaning of s9. Finally he has done nothing wrong as a public servant.³⁴

The dismissal of ministers

In relation to Greiner and Moore, Temby said he did not believe that their conduct amounted to a criminal offence under s9(1)(a).³⁵ He did, however, conclude that their conduct satisfied s9(1)(c). That is, it could constitute or involve reasonable grounds for dismissing them as Premier and Minister respectively. In taking this view, Temby relied both on the *Constitution Act* and also the intention of the ICAC Act. Under s35E(2) of the *Constitution Act* the Governor is empowered to remove a Premier. Whilst he conceded that precedents were rare, this did not affect the strict legal position.³⁶ Likewise, the intention of s3 of the ICAC Act was that all public officials from the Governor down be subject to scrutiny of the Commission.³⁷ Temby said:

It would be anomalous if the test of corrupt conduct was completely different for Ministers as against for example, the general mass of public servants. If it appeared that Parliament had looked after some of their number, that would not be conducive to confidence in this Commission or the Act under which it operates. In my view a court construing the provision in question would seek to do so as I have done, because an anomalous and unfair result would otherwise arise.³⁸

Temby was particularly critical of Greiner's role in the appointment, highlighting the fact that he had allowed Moore to proceed,

³⁴ *ibid*, 70.

³⁵ *ibid*, 76-9.

³⁶ *ibid*. 60-3.

³⁷ *ibid*, 60.

notwithstanding his own reservations regarding Metherell.³⁹ He singled out the Premier's belief that Metherell "was a man capable of political treachery, personal disloyalty and deceitfulness".⁴⁰ Significantly, however, the Commissioner also accepted that Greiner did not believe his conduct was in any way improper:

As with Metherell, I do not think it can be concluded that Greiner saw himself or would be seen by a notional jury as conducting himself contrary to known and recognised standards of honesty and integrity.⁴¹

Whilst accepting that Greiner initially regarded the appointment as a "smart political move", he nonetheless said that the set of actions implemented was "deeply flawed in principle", a factor which the Premier would have realised had he consulted more widely with his ministerial colleagues or advisers.⁴²

Temby argued that Moore's case was somewhat clearer than Greiner's in regard to the appointment, and thus the grounds for dismissal. While Greiner was aware that Moore had been motivated by his friendship for Metherell, the Premier did not know to what extent that had influenced his Environment Minister:

... only Moore knew the extent of that as a motivating force, and it was considerable. He went beyond ensuring that Metherell was not precluded from consideration for a senior public service position by reason of his controversial Parliamentary career [as was Greiner's concern according to Temby]. Moore favoured his friend so as to ensure he got the job. It is about as good an example as one could imagine of official functions being exercised in a manner which was positively partial.⁴³

³⁸ *ibid*, 63.

³⁹ *ibid*, 73.

⁴⁰ *ibid*.

⁴¹ *ibid*.

⁴² *ibid*.

⁴³ *ibid*, 79.

Despite arguing that Greiner and Moore's conduct did meet the requirements of s9(1)(c), Temby said he was not prepared to advise the Parliament as to how it should respond to such a finding:

It is clear to me that the Commission should not seek to anticipate what the Parliament would or might do in given circumstances. Apart from practical difficulties, each House of the Parliament comprises elected members. Each House is properly jealous of its privileges. No appointee to office should presume to tell the Parliament what to do.⁴⁴

He did however state:

If it appears that the conduct of Greiner or Moore is such as could constitute reasonable grounds for dismissing him from office, by the Governor acting alone or on the advice of the Executive Council, then that will suffice to meet the test set by s9(1)(c) of the ICAC Act. It is not necessary to conclude that the conduct should in fact give rise to dismissal. It will be enough that it could, that is to say that a decision to dismiss on the basis of it is capable of being categorised as reasonable.⁴⁵

Reaction to the report

Nick Greiner's immediate response to the ICAC Report was to resign as Premier.⁴⁶ However, following advice from counsel and with the support of his wife and family, Greiner decided to tough the issue out.⁴⁷ This was reflected in his public comments in which he sought to apply the best possible gloss to Commissioner Temby's findings. Greiner said the report found that he and Tim Moore had "... acted in accordance with the standards of honesty and integrity [that applied at that time]" and that at worse their conduct was only "technically corrupt".⁴⁸ In taking this approach, Greiner was clearly seeking to distinguish between the formal ICAC definition of corrupt conduct and popularly understood definitions. Greiner argued it was ridiculous to claim that he had acted with honesty

⁴⁴ *ibid*, 63.

⁴⁵ *ibid*, 64.

⁴⁶ Greiner, second interview.

⁴⁷ *ibid*. See also N. Richardson, "The scenario said resign, but advisers said fight on," *Australian*, June 22, 1992, 6.

⁴⁸ See D. Ikin, "I'll fight," *DTM*, June 20, 1992, 1-2.

and integrity and at the same time to suggest he was corrupt.⁴⁹ Rather than resigning as expected, the Premier said he would challenge the finding in the NSW Court of Appeal.⁵⁰ He also called on the Opposition to postpone a planned no-confidence motion pending the proposed appeal.

The coalition immediately moved to support its leader, with the president of the NSW Liberal Party, Peter King, describing the report as contradictory:

I am concerned as a civil libertarian and a barrister, that any organisation has a power to say that nobody has committed a criminal offence but on the other hand still point the bone and say that conduct amounts to wrongful conduct, and then leave it up in the air with no avenue of appeal.⁵¹

King's concerns were endorsed by a range of other high profile Liberals, including the Tourism Minister, Michael Yabsley, who said he would resign from Cabinet if the Premier resigned, John Valder, the former federal president of the Liberal Party and NSW Liberal Senator Bronwyn Bishop.⁵² The Deputy Premier and National Party leader, Wal Murray, who had been criticised in a previous ICAC report⁵³, also defended Greiner and Moore, likening the finding to being "fined for doing 70 kilometres in a 60 kilometre zone".⁵⁴ Murray said if there was evidence of

⁴⁹ M. Coultan, "I won't quit," *SMH*, June 20, 1992, 1.

⁵⁰ M. Coultan, "Minister tells Greiner to go," *SMH*, June 22, 1992, 1; L. Morris, "I'll quit if I'm not cleared – Greiner," *DTM*, June 23, 1992, 2; M. Thomas and J. Ferrari, "Greiner puts future in court's hands," *Australian*, June 23, 1992, 1-2; K. Glascott, "Premier gets hearing in Supreme Court," *Australian*, June 24, 1992, 4; L. Morris, D. Ikin and M. Farr, "Libs take on ICAC," *DTM*, June 22, 1992, 1, 4; J. Ferrari, M. Thomas and N. Richardson, "Libs appeal against ICAC," *Australian*, June 22, 1992, 1.

⁵¹ L. M. Garcia and M. Coultan, "Loyalists join attack against ICAC findings," *SMH*, June 22, 1992, 1; L. M. Garcia, "Change is possible: King," *SMH*, June 22, 1992, 6; L. Morris, "Top Lib pours fuel on leadership fire," *DTM*, June 22, 1992, 4; K. Glascott, "Temby conclusion made fundamental error of law: Murray," *Australian*, June 22, 1992, 6.

⁵² L. M. Garcia and M. Coultan, "Loyalists join attack," *SMH*, June 22, 1992, 5; M. Thomas, "Yabsley vows to quit if Premier is ousted," *Australian*, June 22, 1992, 6; J. Cooper, "Bid to pull Greiner back from the brink," *Australian*, June 22, 1992, 15; D. Ikin, "We have made a monster," *DTM*, June 22, 1992, 4-5; J. Cooper, "Cynical move to dodge monster," *Australian*, June 22, 1992.

⁵³ ICAC, North Coast Report (Sydney: ICAC, July, 1990).

⁵⁴ L. M. Garcia, "Greiner caught doing 70 in 60 zone: Murray," *SMH*, June 22, 1992, 8.

corruption then Temby should have recommended criminal charges against Greiner.⁵⁵

ICAC criticised (and defended)

Not only did Government members declare their support for Greiner and Moore, they also criticised the ICAC and Temby, with some questioning the need for its retention⁵⁶. However the ICAC did have some supporters, including former Liberal Attorney General, John Dowd, one of the people responsible for its formation.⁵⁷ Significantly, however, neither Greiner nor Moore were critical of the ICAC or Temby. Greiner's criticism was levelled only at the finding.

The Coalition's attacks on the ICAC and Temby antagonised the non-aligned Independents, particularly Hatton, who was a member of the Parliamentary Committee on the ICAC.⁵⁸ Hatton warned: "The Government will not survive this attack. I think they have been most unwise attacking Mr Temby and the ICAC and they'll live to regret it."⁵⁹ Macdonald said the attack against Temby and the ICAC had prompted him to reconsider his initial response to the report which had been not to support the Opposition's proposed no-confidence motion against the Government. Initially Macdonald told journalists that he did not believe

⁵⁵ In a major show of support for Greiner, he also moved a vote of confidence in the Premier at the National Party's state conference that weekend which was passed unanimously. See L. M. Garcia, "Nats offer warm welcome, but predict end," *SMH*, June 22, 1992, 5.

⁵⁶ These included Murray, Yabsley, the Justice Minister, Mr Griffiths, and a former federal president of the Liberal Party, John Valder. Yabsley was the strongest in his criticism of the ICAC, calling it a monster. Griffiths was quoted in the media as saying that the "ICAC was superfluous because NSW has a court system". See E. Jurman, "Minister wants ICAC abolished," *SMH*, June 24, 1992, 2. Valder was critical of both the ICAC and Temby, questioning the latter's credentials for the job, given that he had stood as a Labor candidate in Western Australia before being appointed by the ALP as federal DPP. See M. Thomas, "Valder says Temby is tainted by Labor past," *Australian*, June 23, 1992, 2; B. Norington, "Temby's past politics under fire," *SMH*, June 23, 1992, 4. In his defence, others said that Temby, through his prosecution of former Labor minister and High Court judge Lionel Murphy and former NSW Labor Premier Neville Wran, had shown his impartiality. See F. Harari, "Playing it straight," *Australian*, June 19, 1992, 11.

⁵⁷ E. Jurman, "Minister wants ICAC abolished," *SMH*, June 24, 1992, 2; E. Higgins, "Dowd rejects Frankenstein charge," *Australian*, June 24, 1992, 4.

⁵⁸ J. Ferrari and M. Thomas, "Independents tighten the noose," *Australian*, June 24, 1992, 4.

⁵⁹ M. Coultan, "Greiner offers to quit," *SMH*, June 23, 1992, 1.

the ICAC Report reflected on the Government as a whole. But following the criticism of ICAC by Valder, Bishop and others, he argued:

I felt this was a matter that was restricted to three or four people, but it is starting to have much wider implications. The whole Government is challenging the report and is starting to take ownership of the thing.⁶⁰

Macdonald's comments were important, given the wording of the charter of reform between the Government and the non-aligned Independents. Under that agreement the non-aligned Independents would only support a vote of no-confidence in the Government if it reflected on the administration as a whole. According to Macdonald, it was beginning to do just that:

The ICAC Report said the Cabinet was not informed of the job offer, but there is a matter of complicity starting to arise here. It will have to be taken into account.⁶¹

Clover Moore agreed:

The crucial issue is ... was the Government as a whole involved in this? It has so far been quarantined to Greiner but if the Government continues to support a Premier with such a finding against him, does that then implicate them? That is what I've got to resolve.⁶²

Greiner rejected claims that he was attacking Temby, arguing that he had legal advice which described the report as "fundamentally flawed on the key finding".⁶³ However he was unable to convince the Independents that the Supreme Court appeal should be heard before the ALP's proposed no-confidence motion was debated. At a two-hour meeting on June 23, Greiner had put two options to the non-aligned Independents in an attempt to buy time: (1) that he and Tim Moore would stand down as

⁶⁰ *ibid.*

⁶¹ *ibid.*

⁶² *ibid.*

⁶³ Parts of this advice were subsequently faxed to the non-aligned Independents by the Deputy Premier in an attempt to convince them to hold-off on debating a censure or no-confidence motion pending the Court of Appeal's finding.

Premier and Minister for the Environment respectively while the Court of Appeal heard their application to overturn the ICAC findings; or (2) that the Parliament notes the report's findings when it resumes on June 24, but defers the no-confidence motion until the following Tuesday (June 30) when the court was to begin hearing the application.⁶⁴ The Independents rejected Greiner's proposal, and gave him an ultimatum: that he and Moore resign within 24 hours or they would support a broader no confidence motion in the Government as a whole. Greiner reportedly told the Independents:

It would be the ultimate travesty of justice if we were to be in some way convicted or dismissed prior to the court making a ruling on a proposition which ultimately is an order that we have not engaged in corrupt conduct in relation to the matter referred to by both houses of Parliament.⁶⁵

He later told journalists:

They do not necessarily accept that view. They seem to be comfortable with the proposition that we could be debated and out one day before the Supreme Court finds, as we would hope and expect they will, that we have not engaged in any corrupt conduct at all.⁶⁶

Despite his confident prediction of the Supreme Court outcome, Greiner appeared to misunderstand the Independents' assessment of the report. Not only did they regard the appeal as a delaying tactic, but they also accepted Temby's argument that the consequences to flow from the report should be dealt with by Parliament. Hatton was particularly forthright in his views:

Even if the court said that the word 'corrupt' was inappropriate, his actions broke his own ministerial guidelines, Senior Executive Service guidelines. The whole process was an abuse of public office

⁶⁴ This in itself represented a major change of heart on Greiner's part, given his refusal to stand aside during the earlier debate on April 28 when the matter was referred to the ICAC for investigation.

⁶⁵ M. Coultan, Greiner clings on," *SMH*, June 24, 1992, 1-2; M. Thomas and J. Ferrari, "Greiner's Showdown," *Australian*, June 24, 1992, 1,4; D. Ikin and L. Morris, "Ultimatum," *DTM*, June 24, 1992, 1-3.

⁶⁶ *ibid.*

for which he should resign, irrespective of what the court says. The guidelines were laid down by the Greiner Government, they set the standards of probity, they failed to meet the standards of probity, the Premier has used the same standards of probity to sack at least one other minister. It is quite clear that if the Premier and Minister Moore do not resign for the benefit of the Government and their own coalition then they will face an election or a baton change - the choice is theirs.⁶⁷

Hatton further argued:

- The standard of behaviour of both the Premier and Mr Moore in the Metherell matter is not acceptable to the general public of NSW, it is not acceptable to me, and consequently that fact has to be recognised irrespective of whether the court finds the use of the word 'corrupt' to be appropriate or inappropriate.⁶⁸

Hatton's comment is particularly important and highlights the difficulty facing Greiner and Moore. He appeared to be applying his own standards to their conduct and was not concerned if that had the sanction of the courts or not.

Greiner responded to the threat of a baton change. At a press conference called following his resignation on June 24, Greiner criticised the non-aligned Independents and some of his colleagues:

You could imagine my sense of outrage at what does amount to being shot a couple of days before the trial, but nevertheless politics is what it is. I believed yesterday and I believe now ... that if the Party and the Cabinet had the courage, the right thing to do is in fact to allow the court to take the decision.⁶⁹

Whilst Greiner and Moore were fighting for their political lives, Metherell provided his critics with further ammunition by announcing that he would not take up the SES position. He advised Humphry of his

⁶⁷ L. M. Garcia, "Independents issue ultimatum," *SMH*, June 24, 1992, 23; D. Ikin and L. Morris, "Ultimatum," *DTM*, June 24, 1992, 1-3.

⁶⁸ *ibid.*

⁶⁹ M. Coultan, "Fahey comes out fighting," *SMH*, June 25, 1992, 1-2; and S. Olsen, "I was shot before a trial," *DTM*, June 25, 1992, 2-3. See also Greiner's statement of resignation published in full in the *DTM*, June 25, 1992, 3 and the transcript of his press conference, "Outrage at being shot before trial," *SMH*, June 25, 1992, 18.

decision by letter on June 22.⁷⁰ He also said that he would not be seeking or accepting compensation:

This decision, reached with my family, is right and made at the right time now that ICAC has cleared my name of any hint of corruption or misconduct. I want to make clear that my decision is a personal and private one. It is taken now because to have taken it earlier would have been said by some to be an admission of "guilt" or wrongdoing. There has been none, as ICAC has clearly found and concluded in its Report. ICAC has found no grounds whatsoever for dismissal or termination of my appointment, and no corruption or criminality whatsoever on my part.⁷¹

Parliament resumes to debate findings

When the televised parliamentary debate on the Metherell inquiry began that afternoon Greiner was conspicuous by his absence.⁷² Leading the debate, Fahey said the Government had never intended that decisions of the ICAC be "God-like and final" and that principles of natural justice required that they could be appealed through the legal system.⁷³ In a measured speech, he said:

When the day arrives that the decision of any tribunal cannot be taken through the processes of natural justice, we will all be in trouble. No one is infallible and that includes the Government, the Opposition, the lawyers and anyone who wants to get involved in this debate. It includes everyone. It includes the commissioner. The commissioner acted honestly - I make that abundantly clear. There is nothing that I want to say against Mr Temby. He had his responsibility, he undertook that responsibility and he acted properly in accordance with that responsibility. But that is not to say that he is going to be perfect in the law, and that of course will become apparent in the course of the proceedings of the Court of Appeal next week.⁷⁴

⁷⁰ A. Larriera, "Turn-again Metherell turns down his new job," *SMH*, June 23, 1992, 1; M. Thomas, "Metherell knocks back job that started it all," *Australian*, June 23, 1992, 1; and L. Morris, "I don't want the job says Terry," *DTM*, June 23, 1992, 1-2.

⁷¹ See Metherell's statement of resignation, published in the *SMH*, June 23, 1992, 5.

⁷² Greiner had indicated to journalists at his press conference earlier in the day that he was contemplating whether to attend and participate or not. In the end, he and his wife Kathryn decided to take their daughter Kara out for lunch. Earlier in the day Kara had won a public speaking competition.

⁷³ *Hansard*, Legislative assembly, June 24, 1992, 4128.

⁷⁴ *ibid.*

However any goodwill Fahey was prepared to extend to the ICAC and Temby did not flow on to the non-aligned Independents whom he criticised for not allowing Greiner and Moore the opportunity to "vindicate their conduct, to clear their names, and be judged in the context of the final decision, and then be judged by this Parliament".⁷⁵ Fahey introduced a theme which would be taken up by other speakers. That related to the question of partiality and how it could be measured:

What will be the standard of conduct relating to partiality? If the honourable member for South Coast, or for that matter the honourable member for Drummoyne, were to say to me when I visit their electorates, "I need some support for a school", what will I have to do - pull a lawyer out of my back pocket and say, "Am I going to exercise partiality if I grant that support?" If Government members, who invite me to their electorates regularly, ask me for something, will there be partiality in that context?⁷⁶

While Fahey used his speech to defend the reputations of Greiner and Moore, Carr sought to further implicate the Government in the Metherell appointment. Describing the finding against Greiner as "the most serious findings against a Premier in ... 136 years of responsible government",⁷⁷ Carr claimed that the actions of Greiner and Moore had been endorsed on "four or five occasions" by the Cabinet.⁷⁸ Carr's tactic was clear. Sensing that the non-aligned Independents could be persuaded to support a vote of no-confidence in the Fahey Government, he claimed that the new Premier had left a position in the Cabinet open for Greiner. He even described the new Premier as a "pale, loitering caretaker figure - while the honourable member for Kur-ing-gai is warehoused for his eventual return".⁷⁹ In fact Carr claimed that Fahey's appointment to the premiership was part of a "sleazy deal" which involved the agreement that the Government would fund Greiner and Moore's legal challenge.⁸⁰

⁷⁵ *ibid.*

⁷⁶ *ibid.*, 4129. This was also taken up by other speakers, including Windsor, in the later debate.

See *Hansard*, 4177.

⁷⁷ *ibid.*, 4131.

⁷⁸ *ibid.*, 4132.

⁷⁹ *ibid.*, 4131.

⁸⁰ *ibid.*

Like the non-aligned Independents, Carr's strategy included a defence of the ICAC and Temby. In a wide-ranging attack, he accused the Government of mounting:

[A] campaign of misrepresentation and vilification - a campaign to circumvent this Parliament and to pre-empt its consideration of the report; a campaign to which the whole Executive Government, the Cabinet, the new Premier are committed and are carrying out still.⁸¹

Carr said Temby had been "scrupulously fair".⁸² While Carr's argument was clearly intended to maintain the political rage against the Government, Tim Moore used his final parliamentary speech to repeat the earlier justifications for the appointment of Metherell to the Public Service and to highlight the injustice of the finding and the political consequences that could flow from it. He also told MPs that the decision to resign had been taken "in the interests of our party, of our colleagues, and above all what we believe is in the interests of the Parliament and the citizens of the state of NSW".⁸³ Moore said that he and Greiner could have forced a vote in the Parliament but had opted not to:

The consequences of that would have been to damage the party that has been loyal to me and that has provided me with political support and succour over the past 20 years; to damage the Government; to damage my friends within the Government - I draw a distinction between merely the Government and my friends within it - and equally, to damage the Parliament and the governance of the State.⁸⁴

Moore's comments, as did those of Greiner during his press conference earlier in the day, highlighted the tensions that clearly existed within Government ranks. Significantly, they also confirmed the value he placed on friendship. In fact he highlighted his friendship with both Metherell and Greiner and his wish that they continue into the future.

⁸¹ *ibid*, 4132.

⁸² *ibid*, 4134.

⁸³ As evidence of this he cited Temby's decision not to grant the Opposition leave to appear at the inquiry and also his decision to hear final submissions in private. See *Hansard*, 4135. He also claimed that Greiner had received the benefit of the doubt on a number of occasions throughout the report, including the Commissioner's interpretation of the March 9 telephone call to Metherell. See *Hansard*, 4137.

⁸⁴ *ibid*, 4142.

Like Fahey, Moore focused on the question of partiality, arguing that ministers must act in a partial fashion every day of their ministerial lives. He indicated that in the previous fortnight alone he had made between 30 and 50 appointments "that would fail Commissioner Temby's test of partiality".⁸⁵ He said that he had appointed friend and foe alike:

In the past two or three weeks I made appointments of people whom I knew were my political opponents to advisory committees, boards and the like, because I knew that they were capable of doing the tasks. I did that from my personal knowledge.⁸⁶

Macdonald, the first of the non-aligned Independents to speak in the debate, rejected the argument that the non-aligned Independents had misused their powers, claiming that unlike the members of the major parties, he and his colleagues on the crossbenches had not forfeited their right to vote according to conscience. Macdonald accused coalition and Labor MPs of putting their parties above their consciences and their responsibilities to their electorates.⁸⁷

Describing the Metherell affair as "a raw purchase of political power",⁸⁸ he said the matter should be decided by the Parliament, not the Supreme Court, given that the reference to the ICAC was from the Parliament itself and given also that the Metherell affair involved "bargaining a parliamentary seat for a job"⁸⁹:

This is a matter, I would argue, for the supremacy of Parliament. The facts themselves are sufficient in this debate. The question has arisen about the Supreme Court reference and determination of the matter in a legal context. The ICAC, I would argue, is an administrative body. This is a political matter for the Parliament to consider.⁹⁰

According to Macdonald, an opinion poll of his electorate the previous weekend showed that 59 percent of people surveyed believed Greiner

⁸⁵ *ibid.*, 4138.

⁸⁶ *ibid.*

⁸⁷ *ibid.*, 4161.

⁸⁸ *ibid.*

⁸⁹ *ibid.*, 4162-3.

should resign, 64 percent said Moore should do so and almost 40 percent said there should be a change of government.⁹¹ He said this showed a significant change in attitude over the month: "The mood has changed. The stain has been spreading. The Government has been taking ownership of the corruption."⁹²

Hatton argued similarly, contending that the facts could not be altered by an appeal to the Supreme Court. He described the decision to refer the finding to the Supreme Court as a red herring:

The Government knows from the statement of claim that the Supreme Court cannot undo it. The Supreme Court will not address the senior executive service guidelines; it will not address the ministerial code. If the Supreme Court finding is that the two gentlemen concerned were not corrupt or that 'corrupt' was too strong a word, I would not be unhappy with that, but that would not exonerate them. The fact is that the crime they committed was one for which they should have resigned because it was a misuse of public office and no amount of obfuscation in the Supreme Court can or will remove that.⁹³

He said the most difficult question for him was not whether Greiner and Moore should resign, but whether the appointment touched on the whole government and, if so, whether it was sufficient to warrant a vote of no confidence. He concluded that the appointment did touch on the Government as a whole. "One cannot have the warmth of a political party, the camaraderie, the loyalty and the rest of it without accepting some sort of joint responsibility," he claimed.⁹⁴

Clover Moore accused Greiner of having misrepresented the report's findings and she was critical of the Government for attacking the ICAC and Commissioner Temby.⁹⁵ However she did accept that the Government had separated itself from Greiner and Moore and because of this indicated that she would not be supporting the Opposition's

⁹⁰ *ibid.*, 4161-3.

⁹¹ *ibid.*, 4164.

⁹² *ibid.*

⁹³ *ibid.*, 4171.

⁹⁴ *ibid.*, 4173.

proposed no confidence motion. And while she claimed to be saddened by the outcome, said the Independents had no alternative but to force their resignations.⁹⁶

While agreeing that Greiner and Moore's resignations were inevitable, Windsor criticised the other Independents for not allowing them time for the Supreme Court to hear and report upon the ICAC findings:

I believed that eventually Mr Greiner and Mr Moore would have had to resign. However, I believed also, and I still believe this strongly, that they had the right of appeal. That right is available in every other tribunal or court in this land. This country is known for giving people a fair go, but I do not believe these people were given a fair go. ... I believe that Mr Greiner and Mr Moore had the right to have the legality of the decision tested by another court. Every other legal process in this country allows that. They should have had that opportunity.⁹⁷

The non-aligned Independents were also criticised by Fahey in his concluding remarks. He accused them of having demanded and secured the resignations of Greiner and Moore before Parliament was able to consider the findings against them:

Commissioner Temby said ... the Parliament must not treat this grave and onerous task lightly. Despite that, the decision was made last Friday, Saturday, Sunday, Monday, Tuesday and this morning before the bells rang for the sitting of the House. There has been no compliance whatever with the recommendation of Commissioner Temby flowing from his inquiry and no sense of fair play in the context of what Commissioner Temby recommended in grave terms. He put the onus on members of Parliament to properly exercise their responsibilities when considering dismissal and to exercise them in a way that might bring honour upon this Parliament. In the history of the State of New South Wales the great irony of the present time will be that as this debate concluded, the bodies were growing cold. They are gone, they are politically dead, because that was demanded before the Parliament had anything to do with the report of Commissioner Temby.⁹⁸

⁹⁵ *ibid*, 4187.

⁹⁶ *ibid*, 4191.

⁹⁷ *ibid*, 4176.

⁹⁸ *ibid*, 4191-2.

When the House resumed on June 30, Carr moved his foreshadowed no-confidence motion. However the motion failed when the three non-aligned Independents agreed that the appointment had been made without the knowledge of Cabinet.

Supreme Court appeal begins

On the day Parliament debated the no-confidence motion, the NSW Court of Appeal began hearing submissions from counsel for Greiner and Moore.⁹⁹ Gyles and Porter, again representing Greiner and Moore respectively, challenged Commissioner Temby's findings on two grounds. They argued: (1) that under a true construction of the Act, s9(1)(c) does not apply to a Premier or Minister; and (2) Commissioner Temby did not explain why the conduct of Greiner and Moore was corrupt or why s8 or s9(1)(c) of the ICAC Act applied to their actions.

In a 2:1 decision, the Court upheld Greiner and Moore's challenge, directing that the ICAC had acted without or in excess of jurisdiction in finding that their conduct was corrupt within the meaning of the Act. The majority judges, Gleeson CJ and Priestley JA, further held that on the facts as found in the Report, the determination was wrong in law.¹⁰⁰ The third judge, Mahoney JA, dissented, arguing that Temby had acted within his powers in finding that Greiner and Moore had acted partially and in breach of public trust. He also found that the Commissioner's finding that the conduct of Greiner and Moore satisfied s9(1) was "probably correct".¹⁰¹

In their judgments, the three judges highlighted the definitional difficulties surrounding 'corruption' or 'corrupt conduct'. Gleeson said

⁹⁹ Normally a hearing of this nature would be heard by a single judge sitting in the Administrative Law Division of the Supreme Court. However in this case it was decided to transfer the hearing to the Court of Appeal, given the importance of the outcome and the public interest in the case. Whilst the urgency dissipated with the resignations of Greiner and Moore, the decision was taken to continue proceedings in the Court of Appeal. Evidence was taken over four days (June 30 and July 1-3) with the judgment handed down on August 21.

¹⁰⁰ Under the ICAC Act, the Supreme Court was not able to re-test the facts as established by Commissioner Temby.

that the definition of 'corrupt conduct' in the ICAC Act was "both wide and, in a number of respects, unclear".¹⁰² He also pointed out that an ICAC finding of corruption could have "devastating consequences for individuals".¹⁰³ The chief justice said that such a finding could make their position in public office "untenable".¹⁰⁴ Mahoney argued that the description of their conduct as 'corrupt' was not one which "in the ordinary and proper use of language would be applied to it".¹⁰⁵ He said: "It would ordinarily and apart from the Act be wrong to describe that conduct as corrupt."¹⁰⁶ Highlighting the particular requirements of the Act, he said: "The Commission has reported that the conduct is 'corrupt conduct' because, in the circumstances, the Act requires that it do so."¹⁰⁷ Elsewhere he said: "For its own purposes or because of a failure to appreciate the damage which could be done, the Act requires the Commission to apply a misleading description to some of the conduct with which it deals."¹⁰⁸ Priestley said the finding "was not of corrupt conduct in any ordinary sense".¹⁰⁹

In their decisions, both Gleeson and Mahoney said there was no reviewable error in the Commissioner's conclusion that the conduct of Greiner and Moore fell within s8 of the Act. Gleeson said at the very least he was satisfied that their conduct satisfied s8(1)(a).¹¹⁰ However he did suggest there were some deficiencies in Temby's rationale, saying that the Commissioner had not indicated what was involved in the concepts of partiality and impartiality in s8.¹¹¹ He also said there was room for argument as to the necessary mental element required to bring conduct within some of the provisions of s8, conceding that there may have been some merit in counsels' submission that Temby had applied too low a

¹⁰¹ Mahoney, judgment, 3.

¹⁰² Gleeson, judgment, 3.

¹⁰³ *ibid*, 4.

¹⁰⁴ *ibid*.

¹⁰⁵ Mahoney, judgment, 3-4.

¹⁰⁶ *ibid*, 4.

¹⁰⁷ *ibid*.

¹⁰⁸ *ibid*, 65.

¹⁰⁹ Priestley judgment, 4.

¹¹⁰ Gleeson, judgment, 36.

¹¹¹ *ibid*, 35-6.

standard in his thinking on this issue.¹¹² However Gleeson said he was not required to address this latter issue.¹¹³ Priestley did not consider whether there was an error of law in relation to s8(1).

Justice Mahoney, dissenting, said that in dealing with the question of partiality it was necessary to identify the “mischief” with which the Act was intended to deal.¹¹⁴ He said that the proscription of partiality under the Act was intended to “prevent the misuse of public power.”¹¹⁵

Mahoney said:

Power may be misused even though no illegality is involved or, at least, directly involved. It may be used to influence improperly the way in which public power is exercised, eg how the power to appoint to the civil service is exercised; or it may be used to procure, by the apparently legal exercise of a public power, the achievement of a purpose which it was not the purpose of the power to achieve. This apparently legal but improper use of public power is objectionable, not merely because it is difficult to prove but because it strikes at the integrity of public life: it corrupts. It is to this that ‘partial’ and similar terms in the Act are essentially directed.

It is wrong deliberately to use power for a purpose for which it was not given: partiality is a species of this class of public wrong. Public power has limits in addition to those imposed by the terms on which it is granted. Legislation may, in granting power, impose limits as to the circumstances in which it may be exercised or the mode of its exercise. But there are in addition limits upon the ends for which it may be exercised. Where the power is a statutory power, the objectives which a Minister or public official may seek to achieve by the exercise of it are to be derived from the construction of the Act or instrument by which it is given. ... But even where the power derives from an office, eg, the office of Minister, that power must be exercised to achieve only the appropriate public purpose.¹¹⁶

Whilst Gleeson concluded that Greiner and Moore had found themselves in a situation where there was a conflict between duty and interest,¹¹⁷ Mahoney went further, arguing that the use of a public power to “comply with the wishes of a political party” could constitute a

¹¹² *ibid*, 35.

¹¹³ *ibid*, 36.

¹¹⁴ Mahoney, judgment, 21.

¹¹⁵ *ibid*, 25.

¹¹⁶ *ibid*, 25-6.

¹¹⁷ Gleeson, judgment, 36.

crime.¹¹⁸ He said that in the present case, at least part of the conduct was outside the powers of appointment attached to that office.¹¹⁹ "The use of the term [partial] in s8 involves the vice of doing what is administratively wrong with a consciousness that it is wrong," he said.¹²⁰ According to Mahoney, Humphry's advice to Greiner and Moore was intended to avoid the strict requirements of the law.¹²¹ Whilst he said there were occasions in which it was possible to take political goals into account when using public power or even to use public power to achieve a political objective, in this case that was not acceptable:

There is a conceptual difference between the factors which may be taken into account in the exercise of a political power and the objectives which may be sought to be achieved by the exercise of it.¹²²

Mahoney argued that public power must be exercised for a public purpose, rather than for a personal or political purpose. He said that the objective of Metherell's appointment was not one for which the power of recommendation of appointment was given to Humphry as departmental head. Nor was it one which, in the exercise of their office as Ministers, it was for Greiner or Moore to pursue.¹²³ In taking this approach, Mahoney pointed to the intention of s26 of the PSM Act. That was: "... to have for the good of the public administration the best person fitted for the position. ... And it laid down the way in which the power was to be exercised."¹²⁴ He said that accordingly, there was scope for Temby to find that Greiner and Moore had acted partially.¹²⁵ Furthermore, he concluded there was room for the Commission to find that their conduct amounted to breach of trust under the Act.¹²⁶

¹¹⁸ Mahoney, judgment, 26.

¹¹⁹ *ibid*, 27.

¹²⁰ *ibid*, 29.

¹²¹ *ibid*, 30.

¹²² *ibid*, 33.

¹²³ *ibid*, 34.

¹²⁴ *ibid*.

¹²⁵ Mahoney, judgment, 35.

¹²⁶ *ibid*, 37.

All three judges acknowledged that the real issue was whether s9(1)(c) could be applied to the present case as Temby had found. However they differed as to the interpretation and application of s9(1)(c). Gleeson rejected the argument by counsel for Greiner and Moore that s9(1)(c) did not apply to a Premier or Minister. The chief justice argued: "there is nothing in the language of the statute which warrants reading s9(1)(c) as though it applied only to some public officials and not others," he said.¹²⁷ Gleeson said that such an interpretation would be "contrary to what Parliament was told the legislation was intended to achieve".¹²⁸ Mahoney agreed, indicating that ministers were included under the definition of public official in s3 of the Act.¹²⁹ However Priestley took a somewhat different view, suggesting he was aware of no present set of circumstances that would make s9(1)(c) apply to a minister except circumstances already falling within paragraph (a) of s9.¹³⁰ Priestley described paragraph (c) of s9(1) as "something of a fail safe paragraph".¹³¹ He said it was difficult to imagine something that would not fall within either paragraph (a) or (b).¹³² In fact he argued that paragraph (c) would only rarely be used compared to the other parts of s9(1).¹³³

Whilst he accepted that s9(1)(c) could apply to all public officials, Gleeson was critical of the test of reasonable grounds employed by Temby in linking s8 and s9(1), particularly in relation to dismissal under paragraph (c). The chief justice accepted Temby's conclusion that dismissal by the Governor, either acting unilaterally or upon the advice of the executive council, would be rare. However he was critical of Temby for not addressing what he considered to be the critical question: "What kind of conduct constitutes grounds for dismissal?"¹³⁴ The chief justice said that

¹²⁷ Gleeson, judgment, 33.

¹²⁸ *ibid.*

¹²⁹ Mahoney, judgment, 45.

¹³⁰ Priestley, judgment, 27.

¹³¹ *ibid.*, 10.

¹³² *ibid.*

¹³³ *ibid.*

¹³⁴ Gleeson, judgment, 39.

while the standards involved were “vague and uncertain”, the Commission’s task was to identify and apply the relevant standards, not create them.¹³⁵ “[T]he Commission cannot create new grounds for the dismissal of public officials,” he said.¹³⁶ Gleeson argued that on a true reading of s9 the test of what constitutes reasonable grounds for dismissal is objective and that determinations should be made by reference to standards established and recognised by law. “It does not turn on the purely personal and subjective opinion of the Commissioner,” he argued.¹³⁷ Furthermore, he said that in seeking to identify the appropriate standards, Temby could have relied on history, precedent and analogy.¹³⁸

The chief justice said that in the Metherell report there was a “large gap between the factual premise and the ultimate conclusion involved in the determination that s9(1)(c) was satisfied”.¹³⁹ He concluded:

For my part I have the gravest difficulty in understanding how conduct that has not been found to be unlawful, that was believed to be in all respects lawful, and that would not be seen by a notional jury as being contrary to known and recognised standards of honesty and integrity, could reasonably be regarded by a Governor or an Executive Council as grounds for dismissal of a Premier or a Minister.¹⁴⁰

Priestley was particularly critical of Temby’s findings, arguing that it was not “based on any standard of corrupt conduct established or recognized by the law or defined by the Act”.¹⁴¹ He said the standard Temby employed was “... one he thought appropriate notwithstanding that it had not previously been established or recognised”.¹⁴² Priestley interpreted “reasonable grounds” within the Act to mean “reasonable legal grounds”.¹⁴³ However he said that the Governor’s legal powers were

¹³⁵ *ibid*, 41.

¹³⁶ *ibid*, 42.

¹³⁷ *ibid*, 38.

¹³⁸ *ibid*, 43.

¹³⁹ *ibid*, 40.

¹⁴⁰ *ibid*.

¹⁴¹ Priestley, judgment, 1.

¹⁴² *ibid*, 2.

¹⁴³ *ibid*, 17.

constrained by "constitutional practice, political necessity and political practicality".¹⁴⁴ It was these constraints, he argued, which:

[N]o doubt explains why it is impossible to point to any standard established by law by reference to which the Governor, upon being satisfied of facts showing a breach of the standard, can take action to dismiss.¹⁴⁵

Priestley's main concern appeared to be with Temby's conclusion that "reasonable grounds" for dismissal were subjective, rather than by any known standard.¹⁴⁶ Priestley, like Gleeson, was concerned that if Temby's interpretation of s9(1)(c) prevailed, it would be open to the Commission to introduce new standards as reasonable grounds for dismissal of the Premier.¹⁴⁷ Accordingly, he agreed with Gleeson's argument that s9(1)(c) could not apply to ministers for the reasons given by Gyles.¹⁴⁸ He said:

I can see no sign in the Act ... of any function given to the Commissioner of simultaneously stating a new standard and finding that the conduct of a public official has been corrupt for the purposes of the Act, because of breach of that freshly created standard.¹⁴⁹

Mahoney, on the other hand, rejected the argument of Gyles and Porter that the criterion "reasonable grounds" could not be applied to ministers under s9(1)(c).¹⁵⁰ Mahoney said the Governor did not require "reasonable grounds" to dismiss the Premier or Minister; that such power could be exercised without cause.¹⁵¹ However he said that dismissal could only be justified if the conduct relied on is of great seriousness.¹⁵² But he warned:

In judging the seriousness of what they did, two things are to be borne in mind: reasonableness is to be judged by reference to contemporary standards but it is not concluded by them; and seriousness for this purpose is a matter of degree. In judging what is

¹⁴⁴ *ibid*, 21.

¹⁴⁵ *ibid*.

¹⁴⁶ *ibid*, 25.

¹⁴⁷ *ibid*.

¹⁴⁸ Priestley, judgment, 26

¹⁴⁹ *ibid*.

¹⁵⁰ Mahoney, judgment, 45.

¹⁵¹ *ibid*, 48.

¹⁵² *ibid*, 52.

reasonable, ie, can justify dismissal, the standards are not those of More's Utopia, nor is the matter to be judged merely by what community standards may or should be at some distant future. On the other hand, the standard is not determined merely by aggregating the opinions or the conduct of all of those in the community who have thought or acted in the relevant way. The determination of normative standards is not made that way. ... The Commission, and this Court, may in this regard see a distinction between what is and what should be, bearing in mind at all times that it is what the standard should be for the existing community which is to be considered.¹⁵³

Unlike Gleeson, Mahoney said he believed that it was open to the Commission to conclude that Greiner and Moore's conduct *could* constitute grounds for their dismissal under the Act.¹⁵⁴ However he qualified his findings, arguing that he did not believe their conduct *did* constitute 'reasonable grounds' for their dismissal by the Governor.¹⁵⁵ Mahoney said that whilst their conduct was serious, the fact that the power of dismissal resided only with the Governor, coupled with the subjective influences, suggested otherwise.¹⁵⁶ In relation to the second part he was referring to the fact that neither Greiner nor Moore appreciated the seriousness of their conduct and would have been unlikely to persevere if they had known:

In my respectful opinion, it may be thought that they are good men who have, by an error as to the seriousness of what they were doing, fallen foul of the Act. Factors such these would have led me to conclude that they should be condemned but not dismissed.¹⁵⁷

In taking this approach, Mahoney pointed to the political constraints which tend to prevent the misuse of power. He said that the legal power vested in the Governor should only be used in special circumstances.¹⁵⁸

¹⁵³ *ibid*, 53-54.

¹⁵⁴ *ibid*, 52.

¹⁵⁵ *ibid*, 54.

¹⁵⁶ *ibid*.

¹⁵⁷ *ibid*, 56.

¹⁵⁸ *ibid*, 55.

Greiner and Moore vindicated

The reactions of Greiner and Moore to the Supreme Court decision was hardly surprising. Both welcomed the court's finding, with Greiner describing the actions of the non-aligned Independents in demanding their resignations as an "unmitigated act of bastardry".¹⁵⁹ Moore's response was mixed. He continued to support the ICAC as an anti-corruption authority, but called for changes to the Act so that there was no repeat of the "injustice and damage" he had suffered.¹⁶⁰

The non-aligned Independents defended their decision to force the Premier and Moore out of office, arguing that they had based their actions on the facts as found by the Commission and that the Court of Appeal decision had not changed anything. Their attitude was summed up by Macdonald:

What are you all going to go home and tell your children tonight - are you going to tell them that in fact it is OK to cheat and give favouritism and cronyism and buy a seat for a job?

If Mr Greiner feels that as a result of this decision that he has got off the hook on a technicality, does that mean that he and others in his party believe that behaviour is acceptable?¹⁶¹

Hatton was likewise unrepentant, saying that he would make the same decision again: "The court didn't vindicate Mr Greiner's actions. It found that the finding of ICAC on the facts was wrong, not the facts themselves, and that Mr Temby had exceeded his jurisdiction."¹⁶²

The ICAC's response

Temby both defended the Commission and foreshadowed an appeal to the High Court. Speaking to journalists, he said: "I think it's fair to say

¹⁵⁹ E. Higgins and M. Whittaker, "Independents stand by threat to Government," *Australian*, August 22-23, 1992, 7.

¹⁶⁰ J. Ferrari, "Act must change: Moore," *Australian*, August 22-23, 1992, 7.

¹⁶¹ *ibid.*

¹⁶² *ibid.*

that in the [Metherell] case we were sailing in uncharted waters and the judges are saying that in a legal sense we took the wrong course.”¹⁶³ The High Court appeal was subsequently abandoned, with Temby opting instead to publish a second report which defended the Commission’s position.¹⁶⁴ His decision for not appealing the decision was explained in the report:

[T]he Metherell affair should be brought to an end sooner rather than later; in any event statutory amendments are very likely and therefore a High Court decision might not be of lasting significance, and to proceed further would involve substantial additional expenditure of public funds.¹⁶⁵

Perhaps more significantly, however, Temby used the report to defend the ICAC against its detractors, to canvas some of the possible consequences of the Court of Appeal decision and to consider some possible changes to the ICAC Act. Temby’s main concern was that as a consequence of the Court of Appeal decision, Ministers had been placed in a special category whereby they could not be dismissed for corrupt conduct unless their behaviour involved: (1) a criminal offence; or (2) a serious departure from standards of conduct recognised and enforced by the law. He said the consequence of the majority decision is that “bias, nepotism and jobs-for-the-boys may be corrupt if done by a public servant but not if done by the holder of high office”.¹⁶⁶ Temby was concerned by this, arguing that for public confidence in the ICAC to be preserved, the same standards should apply to all in the public sector and that the “great and powerful” should not be beyond the Commission’s reach.¹⁶⁷

Nonetheless, Temby did acknowledge that amendments to the Act may be necessary, including changes to the definition of ‘corrupt conduct’. He said the major difficulty was caused by the conditional nature of s9(1), particularly the words “could constitute or involve”.¹⁶⁸ According to the

¹⁶³ B. Woodley, “Temby defends his corruption finding,” *Australian*, August 22-23, 1992, 7.

¹⁶⁴ ICAC, *Second Report*, September 1992.

¹⁶⁵ *ibid*, 6.

¹⁶⁶ *ibid*, 17-18.

¹⁶⁷ *ibid*, 18.

¹⁶⁸ *ibid*, 12.

Commissioner, any attempts to amend the definition should not involve limiting conduct to conduct that was "knowingly wrong".¹⁶⁹ Nor, he argued, should the Commission be restricted to considering criminal misconduct.¹⁷⁰ Temby said the ICAC legislation was drafted to "help combat a corrupt culture" and that to unnecessarily restrict the Commission would be self defeating.¹⁷¹ One possible solution he suggested was to amend the Act so that it was possible to distinguish between 'corrupt' conduct on the one hand and 'improper' conduct on the other. He said that the 'benefit' or 'advantage' could be the determining factor.

The Commissioner also said it was worth changing the Act to make the ICAC's prime function when investigating matters a fact finding one, rather than trying to fit conduct into a particular definition. However if that option were adopted, he said the Commission should retain its right to make findings and recommendations. Otherwise, he warned, there was a risk that people would use the courts to frustrate the Commission's investigatory work.

Greiner and Moore resign as MPs

Whilst they were ultimately vindicated by the Supreme Court, the finding was somewhat belated as far as Greiner and Moore's political careers were concerned. On July 1, a week after he resigned as Minister and during the Supreme Court appeal, Moore announced his retirement. Even in retirement he sought to justify his actions in the Metherell affair:

I would think any minister placed in the position of ... righting a wrong in an electorate, the possibility of doing something for his party and doing something for a person of talent and skills who has made a fundamental mistake in their life and who is destroying themselves, putting all those things together, I would like to think that any minister, a human being in that position, would respond as I did.¹⁷²

¹⁶⁹ *ibid*, 13.

¹⁷⁰ *ibid*.

¹⁷¹ *ibid*.

¹⁷² M. Thomas, "Moore bows out with no regrets," *Australian*, July 2, 1992, 2.

On July 10, Greiner too announced his intention to resign from Parliament, although he did not specify a departure date.¹⁷³ In both cases, the Liberal Party was confident of winning the subsequent by-elections. Greiner's resignation was ultimately announced to the Parliament whilst the former Premier was attending the Barcelona Olympics. The by-elections for both seats were held on August 21.

Conclusion

This chapter reinforces the conclusions to emerge from earlier chapters. It shows how there can be disagreement over the labelling of conduct and the appropriate sanctions to be applied. Furthermore, it shows that not even formal legal definitions of corrupt conduct, such as that which is contained in the ICAC Act, are free from criticism. Commissioner Temby acknowledged the difficulty in his report when he conceded that Greiner and Moore believed their conduct to be in all respects lawful and that a notional jury were unlikely to convict them on charges of corruption. Nonetheless, he found that their conduct did satisfy the particular definition of 'corrupt conduct' contained in the ICAC Act.

The difficulty was further highlighted in the 2:1 decision of the NSW Court of Appeal, particularly the comments of the judges regarding the problems involved in reconciling community attitudes towards corruption and statutory definitions such as those contained in the Act. This problem was also highlighted in responses to the ICAC Report, particularly the comments of the non-aligned Independents, and their preparedness to seek the resignations of Greiner and Moore before they had been given an opportunity to clear their names and reputations through the courts. The non-aligned Independents based their decision to call for Greiner and Moore's resignations on the 'facts' as found by the ICAC, rather than the labelling of their conduct as 'corrupt'. The latter seemed almost incidental in their minds.

The response of the four Independents and the ALP to the First Report shows how an issue such as this can be played out politically. Whilst the three non-aligned Independents and Windsor appeared to be concerned at the impact this decision would have on public perceptions of MPs and particularly the standards they adopt, the ALP appeared to be driven more by thoughts of political gain, namely the possibility of a change of government. In doing that, however, the Opposition was careful to frame its allegations according to formal-legal standards (those contained in the ICAC Act and the Common Law). The fact that they were ultimately denied the prize they sought through the refusal of the non-aligned Independents to support the no-confidence motion in the Government suggests a desire to contain the fallout from such a crisis. In this case, the possibility of the whole Government being implicated in the appointment was ultimately rejected by the non-aligned Independents.

For their part, the inability of Greiner and Moore to convince the three non-aligned Independents that they should be given an opportunity to clear their names before Parliament decided their political fate, perhaps highlights the tenuous nature of politics and attitudes towards notions of accountability and responsibility as they attach to public office. This was highlighted by the debate over such nebulous notions as 'public trust' and 'public interest' and how they related to the nature of politics argument which was central to the defences of Greiner and Moore in particular. As both the inquiry phase and the report phase showed, there is a clear incompatibility between notions of public trust and public interest on the one hand and that of partiality on the other.

As such, this chapter, like the one before it, entices questions about the 'nature' of politics; particularly party politics and the competing obligations which this imposes on MPs. This was particularly evident in the case of Greiner, who had to marry his obligations as Premier to the people of NSW, with those as leader of the Liberal Party to his political

¹⁷³ Perhaps ironically, Greiner announced his decision on the day the ICAC cleared Liberal

colleagues. His belief that the Metherell resignation and appointment would satisfy both did not take into account apparently changing attitudes regarding political behaviour. However they do point to the problems of role conflict which confront political leaders.

The Metherell crisis also highlights the increasing complexity and uncertainty of politics at another level too. That has to do with the relationship between a minister and his or her departmental head. In this case, it was the relationship between Greiner and Humphry and between Moore and Shepherd. The fact that Greiner, Moore and Humphry were criticised by the ICAC for their interpretation of the relationship suggests that expectations can vary depending on one's position..

To date, this thesis has looked at the difficulty MPs have in seeking to justify their behaviour against fluid criteria. In so doing, it has relied on primary documents. The next part of the thesis looks at the way in which they seek to use the media and how the media responds to their messages.